

European University Institute
Department of Law

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The Integration of Matters of Justice and Home
Affairs into Title VI of the Treaty on European
Union: A step towards more Democracy?

Supervisor: Prof. Renaud Dehousse

LL.M. Thesis
Florence, December 1994

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Introduction

Discussions about the democracy of the EU, both on an academic and a political level, seem to be based on the general assumption that any "communitarization" of national policies, in particular the transfer of powers from the Member States to a Community level, leads to a democratic deficit. At the Maastricht Intergovernmental Conference in 1992, Cooperation in the fields of Justice and Home Affairs (CJHA) was formally integrated into Title VI TEU, establishing the new "Third Pillar" of the European Union. In fact, the Third Pillar does not imply total "communitarization", though it does place CJHA for the first time within the single institutional framework of the European Union¹. In the light of the above argument, this formal shift towards Community involvement appears to herald a further step away from democracy at the European level. The aim of this paper is to prove that quite the contrary is true.

Cooperation among the Twelve in the fields of justice and home affairs is, first of all, the consequence of the earlier agreed objective of establishing the internal market as an "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured"². In particular, close links exist between the concept of *free movement of persons*, the removal of internal borders and the need for compensatory measures such as a uniform system of external border controls, a common policy towards third country nationals (visa, asylum and immigration policy) or police and judicial cooperation in order to avoid free movement of criminals, etc.³. Once the objective of establishing a European common market without internal frontiers is agreed, cooperation in the fields of justice and home affairs becomes virtually indispensable⁴. However, questions such as *how much* cooperation and harmonization of laws is needed or *in what form* this should take place cannot be provided by legal reasoning only, i.e. by interpretation, *inter alia*, of article 7a EC⁵. These

¹ See article C TEU.

² Article 7a (2) EC.

³ An impressive inventory of over sixty "essential" and "desirable" compensatory measures has been worked out by the *Group of Co-ordinators on the Free Movement of Persons* in Las Palmas (therefore called the "Palma Document") and subsequently adopted by the European Council at Madrid in June 1989. See below, Chapter 1.B., p. 11.

⁴ See e.g., the excellent essay by Donner; further De Jong, pp. 183-191.

⁵ Nonetheless, only recently the EP has initiated formal legal action in the European Court of Justice under article 175 against the European Commission for its failure to act in implementing the free movement of persons in accordance with the Parliament's interpretation of article 7a

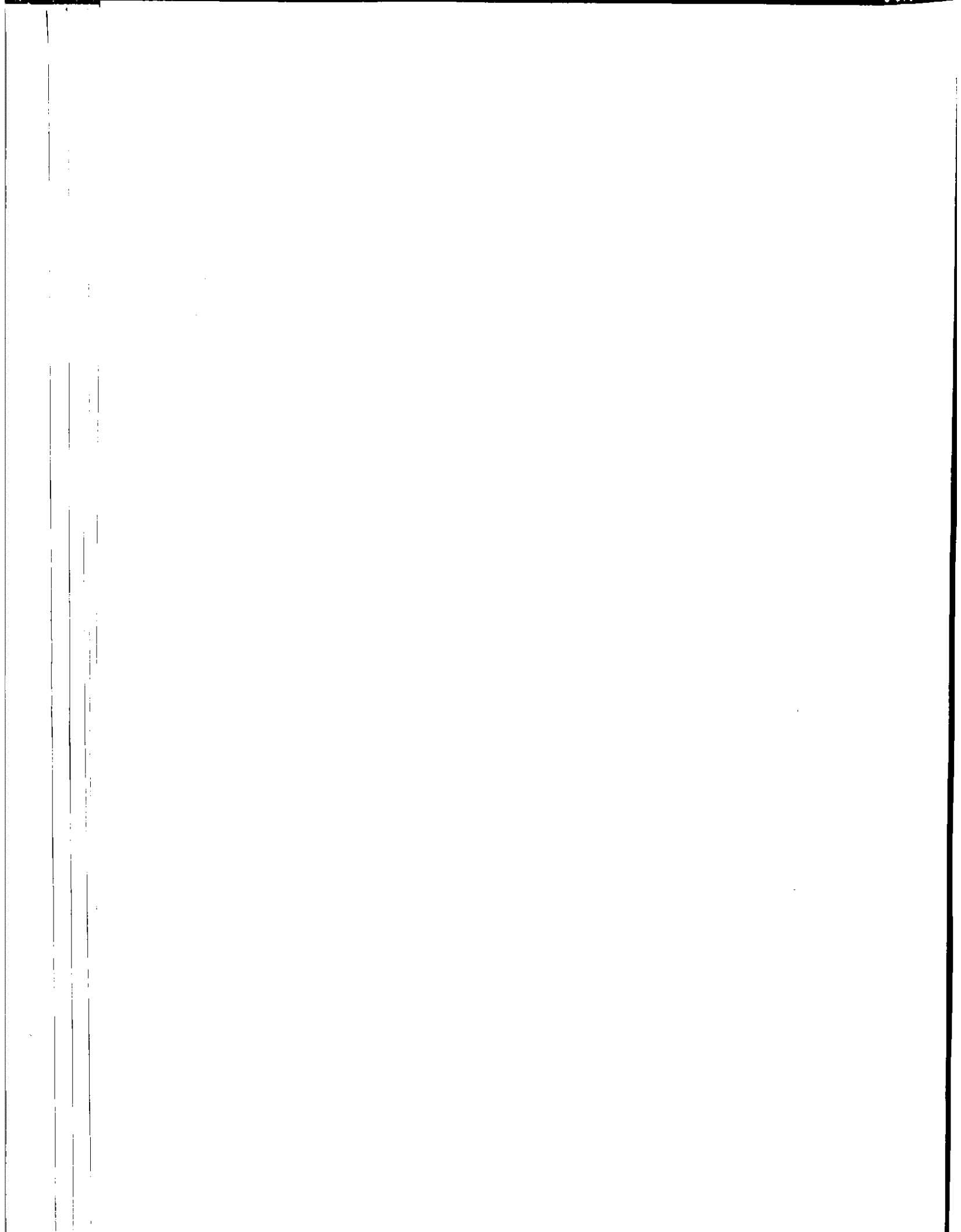
questions remain substantially open to political choice⁶. In spite of this, and this is the point being made here, cooperation among the Twelve in the fields of justice and home affairs corresponds to the almost inevitable logic of the common market and is very likely to increase in the future⁷.

In fact, although the public has been largely unaware of it, the EU Member States have been cooperating in these fields for several years already, i.e. long before Maastricht and the introduction of the Third Pillar. Whereas to a large extent responding to a Community imperative, they have done so outside the Community legal and institutional order. As will be described in Chapter 1 of this thesis, the governments of the Member States have set up a vast number of institutions, working groups and agencies to cover immigration and asylum policy, police, judicial and customs cooperation, etc. These fora were generally established in an ad hoc fashion, at different times and as the need arose. The practical and procedural arrangements varied from area to area, as did the reporting arrangements to Ministers. Work in each of these areas was usually carried out independently of that in others. The result of all this has been an ever-extended, increasingly complex and opaque patchwork of groups, organizations and facilities, differing in terms of their territorial remit (e.g. EC, "Schengen-Group", Council of Europe, United Nations), their area and the quality and intensity of the cooperation they pursue (e.g. coordination and development of

EC. See Pandraud (1994b), p. 24, and O'Keeffe (1994), pp. 150-151.

⁶ The political sensitivity of the issue at stake, and not only the legal coherence of the system is clearly a determinant factor. E.g., the EC Member States accepted the Community procedure in the case of the EEC Directive on the control and acquisition of firearms and ammunition (91/478/EEC, OJ No. L256 of 13.09.1991, pp. 51-58), whereas the United States of America, with a far more integrated structure of government, finds it much more difficult to achieve federal rules on the control and acquisition of firearms. By contrast, common immigration policy for all States has been established for a long time in the United States, whereas no such policy exists yet in the European Union. It is of interest to add that the harmonisation of the law on the acquisition and possession of arms had been labled as an "essential" (or "*sine qua non*" for frontier abolition) measure in the light of article 8a EEC (now article 7a EC) by the EC Member States in the above mentioned *Palma Document* of 1988! See also Donner, esp. pp. 8 and 21.

⁷ However, increased cooperation in these fields cannot only be explained as a consequence of the common market. Firstly, it is arguable that for many political actors the removal of some aspects of interior affairs to the Union level represents a transfer of illegitimacy. As stated by Groenendijk, p. 399, intergovernmental rule-making provides political actors with "a welcome shield against national lobbies and pressure groups in areas that are political minefields. Cautious activities on issues such as immigration and asylum policy seldom bring in many voters." Secondly, external pressure, especially the mounting financial and social cost of uncontrolled immigration into Europe creates a major incentive for harmonizing national immigration and asylum laws (likely at the basis of the common denominator of the least generous criteria) and closer cooperation, even for States remaining outside the Union. On this point ("fortress Europe") see d'Oliveira (1994). Thirdly, international crime, terrorism or drug trafficking are by no means a consequence of the establishment of the internal market only. Thus, provisions on mutual legal assistance and cooperation between law enforcement agencies are one which are desirable in their own right.



legal capacities, policy-making, common operations, operational support). In the words of van Outrive, governments have operated "like chess players who simultaneously play on several chessboards and who determine specific rules for each game"⁸. In this context a considerable amount of policy papers and decisions have been produced by relatively small circles of state officials in conditions of great secrecy mostly escaping any parliamentary supervision, and, partially as a consequence of the latter, often even escaping ministerial supervision. This is particularly disturbing because justice and home affairs touch upon some of the most fundamental human rights, both of Community citizens and of non-EC nationals⁹. Also, *resolutions, recommendations or conclusions* adopted by ministers and state officials in the fora mentioned above, although not necessarily legally binding, *de facto* have had far reaching consequences on individual rights and freedoms¹⁰. Consequently, one may argue, these acts should have resulted from a democratic and legislative procedure rather than a diplomatic one.

In Chapter 2 of this thesis the new legal and institutional framework for cooperation in the fields of justice and home affairs provided by Title VI TEU will be examined, and in Chapter 3 to what extent this new framework will affect parliamentary scrutiny in these policy fields will be analysed at the national level in particular¹¹.

The central question dealt with in Chapters 2 and 3 will be to what extent

⁸ Van Outrive (1992b), p. 7.

⁹ So far, in many EC Member States borders have offered the only possibility to effect (systematic) controls even in cases where no grounds for suspecting criminal activity have existed. Consequently, border controls have served as significant filters in the past. E.g., according to Schattenberg, pp. 44-45, approximately 60 % of all arrests and seizures by the police in Germany occurs at borders. I mention this because it should be made clear that a visible gain of freedom at the border as a consequence of the abolition of border controls might be outweighed by a loss of freedom through less visible and tangible but far more vigorous *compensatory measures*. Indeed, it may be argued that such measures will increasingly be adopted independently of the abolition of border controls. In this case the latter will serve only as a convenient pretext for an expanding intrusion on people's rights and privacy. The fact that today internal border controls still exist strongly supports this argument.

¹⁰ See, e.g., the Commission's survey on the implementation of the 1991 work programme on asylum and immigration, adopted by the European Council in Maastricht 1991, in: *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*, COM (94) 23 final, 23.02. 1994, Annex II.

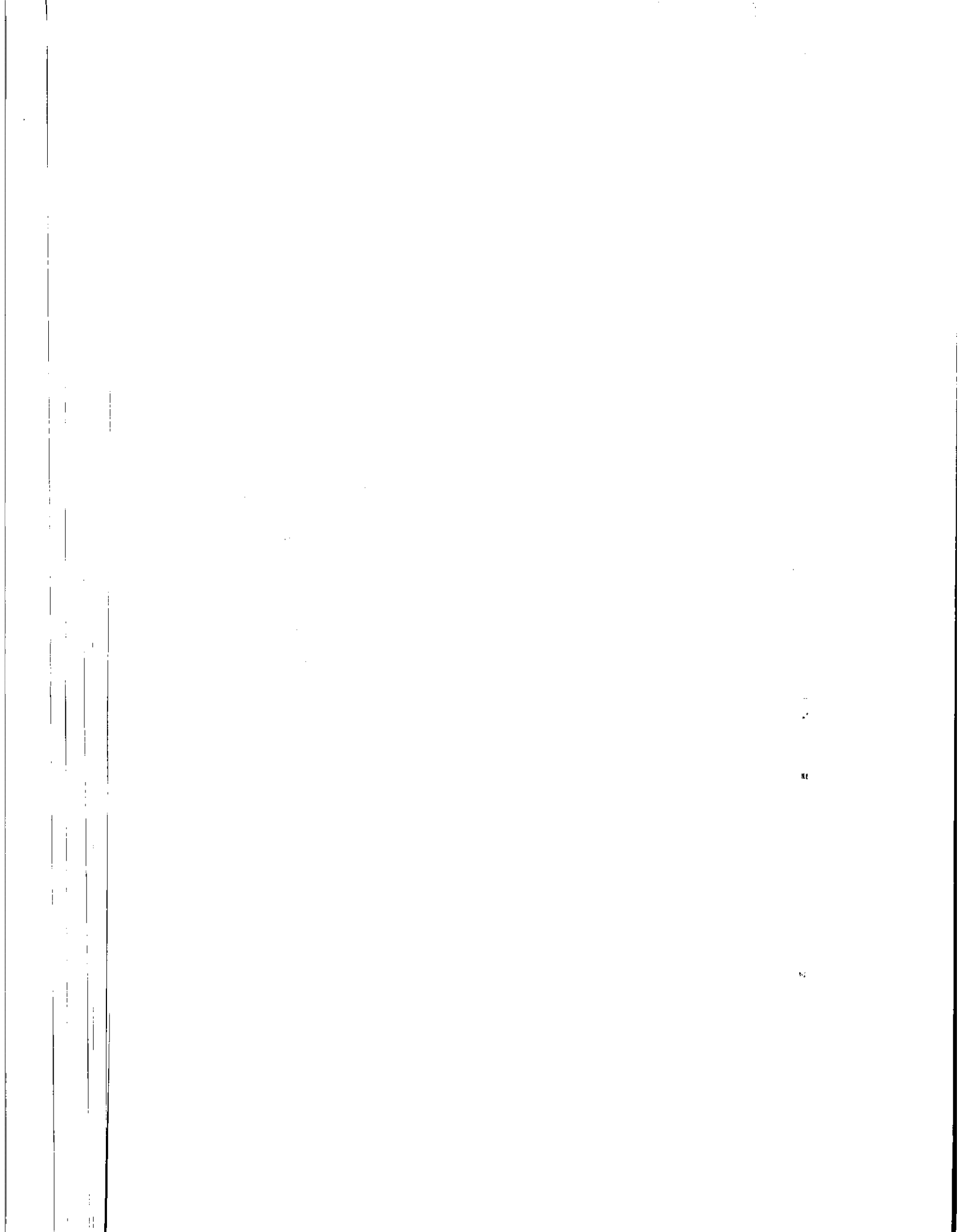
¹¹ Chapter 3 will focus on the role of the British, French and German parliaments. These parliaments were chosen, in particular, for two reasons: firstly, the role attributed to them within their national constitutional system differs distinctively. It may therefore be interesting to compare whether European Union affairs are, notwithstanding these constitutional discrepancies, dealt with in a similar way. Secondly, the United Kingdom, France and Germany may be considered as the politically and economically most important EU Member States.

the establishment of the Third Pillar will make cooperation in these policy-fields "more democratic" than under the procedures existing up to 1993. Of course, creating any new theory of European democracy falls outside the scope of this research. Nor shall there be added a new definition of the so-called "democratic deficit" of the European Union¹². Instead, when discussing democracy I will take two basic elements/criteria as essential for that system of cooperation¹³: The first criterion is *openness*. This criterion is further divided into three subcriteria: (a) complexity of the institutional structure; (b) openness of the decision-making process (publication and explanation of votes, records of debates, etc.), (c) access to drafts and final documents¹⁴. The second criterion is chances of parliamentary participation in the decision-making process (e.g. formal consultation during negotiations; parliamentary approval after decision-taking). †

¹² See on this regard *Karlheinz Neunreither*, *The Democratic Deficit of the European Union: Towards Closer Cooperation between the European Parliament and National Parliaments, Government and Opposition 1994*, pp. 299-309.

¹³ *Alexander Kreher* and I have argued elsewhere that the "traditional" understanding of the democratic deficit of the European Union as an institutional or *parliamentary deficit* is too limited and incomplete. As shown by *Max Weber*, e.g., parliamentarism and democracy are not identical, and parliamentary procedures by no means guarantee democratic substance. Therefore, the "democratic deficit" was defined by the authors more broadly as the lack of public discourse accompanying and guiding the integration process. Yet, (formal) parliamentary participation and accountability, both at national and European level, does undoubtedly increase the chances of public discourse, and the criteria described in the following have to be assessed in this context. Nonetheless, it is clear that other criteria may be just as important (e.g. free elections, separation of powers, protection of minorities, freedom of press etc.). See in detail *Kreher/Weber-Panariello*, pp. 72-86; see also *Max Weber*, *Parlamentarisierung und Demokratisierung*, in: *Kurt Kluxen (Hrsg.), Parlamentarismus*, Köln 1969, pp. 27-40.

¹⁴ See for these three elements of openness *Report of the Committee on Institutional Affairs on openness in the Community*, Rapporteur *Maurice Duverger*, 21 March 1994, A3-0153/94 (PE 207.463(fin)). The criterion of openness seems to be of particular importance with regard to CJHA because, whilst probably the parliamentary system of each Member State provides for the possibility of controlling such activities, the questioning and examining procedures are, in such matters, rather theoretical, in practice, MFs must first and foremost be well informed of the existence, composition and mandates of the intergovernmental fora, their agenda and their work programme.



Chapter 1. European Cooperation in the Fields of Justice and Home Affairs until 1993

A. Community powers and the "Realpolitik of the Commission"

Cooperation among the Member States in the fields of justice and home affairs started well before the 1980s. However, the Commission's June 1985 White Paper on the completion of the Internal Market and the adoption of the Single European Act one year later provided the major impetus for intensified cooperation in these fields¹⁵. The White Paper *inter alia* set out a programme for the removal of internal frontier controls between Member States by 1992¹⁶, and the Annex to the White Paper contained a list of measures (Directives) which, in the Commission's view, were essential in this respect, in particular on the:

- coordination of rules concerning the right of asylum and the status of refugees;
- approximation of arms and drugs legislation ;
- coordination of rules concerning the status of third country nationals;
- easing of controls at intra-Community Borders and the abolition of police controls when leaving one Member State to enter another;
- coordination of national visa policies;
- coordination of rules concerning extradition¹⁷.

Thus, it is of interest to note that the authors of the White Paper apparently had little doubt as to the legal possibilities for the Community to draw up Community legislation that would bring into effect the free movement of persons, including the compensatory measures that would be needed. Yet, at the time of the adoption of the SEA by the Heads of Governments which, in particular by introducing the new articles 8a and 100a EEC gave the go-ahead to

¹⁵ Note, however, that the European Council of Fontainebleau of 25/26 June 1984 had already asked the Council and the Member States to put in hand without delay a study of the measures which could be taken to bring about in the near future "the abolition of all police and customs formalities for people crossing intra-Community frontiers". See Bull. EC 6-1984, point 1.1.9. In reaction to slow progress at Community level, France and Germany concluded an agreement at Saarbrücken in 1984 on the easing of controls on individuals at the French-German internal frontier, followed by the Schengen Agreement between France, Germany and the Benelux States in 1985. The Commission's White Paper was thus anticipated by intergovernmental initiatives which may have put additional pressure on the Commission.

¹⁶ "Our objective is not merely to simplify existing procedures, but to do away with internal frontier controls in their entirety. In some cases this will be achieved by removing the underlying causes which give rise to the controls. In others it will be a matter of finding ways and means other than controls at the internal frontiers to achieve comparable levels of protection." *Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28 and 29 June 1985)*, COM (85) 310 final, 14.6.1986, p. 9 (para. 27).

¹⁷ COM (85) 310, 14.6.1985, pp. 14-16 and Annex, pp. 12-13.

1. Name of the person or organization to whom the letter is addressed.

2. Address of the person or organization to whom the letter is addressed.

3. Date of the letter.

4. Subject of the letter.

5. Signature of the person or organization sending the letter.

6. Name of the person or organization to whom the letter is addressed.

the programme of Community proposals on the completion of the Internal Market, *inter alia*, two declarations were approved by the Governments of the Member States and attached to the SEA¹⁸. The first declaration was made on the subject of articles 13 to 19 SEA¹⁹ to the effect that:

"Nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques."

The second declaration was stated the following terms:

"In order to promote the free movement of persons, the Member States shall co-operate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also co-operate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques."

In addition, paragraph 2 of the new article 100a EEC explicitly excluded provisions relating to the free movement of persons from paragraph 1, the latter providing for qualified majority voting within the Council for provisions to achieve the objectives set out in article 8a EEC. The two declarations and the way article 100a EEC was formulated clearly reflected the reluctance shown by some Member States, the United Kingdom, Denmark and Ireland in particular, to "communitarize" matters of justice and home affairs²⁰. National powers were meant to prevail in these fields, and indeed the Council of Ministers and the Member States continued down the intergovernmental path. Accordingly, the debate on the appropriate legal basis for Community action remained mainly speculative, even though strong arguments were advanced by many legal scholars for the existence of such (limited) Community powers²¹.

¹⁸ Bull. EC - Supplement 2/86.

¹⁹ Articles 13 to 19 SEA introduced, *inter alia*, articles 8a and 100a into the EEC-Treaty.

²⁰ See Cloos *et al.*, p. 491. On the (limited) interpretative value of these declarations see also Fipkorn, in: Groeben/Thiesing/Ehlermann, article 8a, para. 49-51.

²¹ With regard to the existence of Community competences several questions have to be distinguished: first, must the internal market be brought about by the Community institutions or is this not obligatory with regard to the movement of persons? Second, does article 7a EC (former article 8a EEC) impose an obligation to abolish all internal borders? This is closely related to the question of whether article 7a EC applies to EC-nationals/residents only. The distinction between EC and third country nationals means in practice that the free movement of persons (in this case of EC nationals) is impossible to achieve since it entails retaining internal frontier controls (identity checks). Finally, to what extent does article 8a EC (in conjunction with other articles of the Treaty, e.g., articles 3c, 48, 59, 100 and 235 EC) empower the Community to legislate so as to establish the indispensable accompanying measures without which internal border controls can still be justified? With regard to these questions see Butt Philip, pp. 172-175; Donner, pp. 20-

In view of the evident reticence shown by some Member States to accept the "Community approach" in the sensitive area of immigration controls, asylum, visa, drugs control, crime prevention and the like, the Commission adopted a pragmatic strategy, defined elsewhere as the "Realpolitik of the Commission"²², accepting the preferences of governments for the intergovernmental approach. Doubts about the competence of the Community to legislate in these fields were thus also fed by the attitude taken by the Commission itself²³. By 1988, the Commission wrote in its Communication to the Council on the abolition of controls of persons at intra-Community borders:

"The Commission is fully aware of the delicate nature of an exercise of this kind, and it considers that attention should be focused on practical effectiveness rather than on matters of legal doctrine. Therefore, without prejudging its interpretation of the Treaty as modified by the Single European Act, the commission proposes that Community legislation in this field be applied only to those cases where the legal security and uniformity provided by Community law constitutes the best instrument to achieve the desired goal. This would mean therefore that large scope would be left, at this stage, to co-operation among Member States notwithstanding the fact that the Commission should be permitted to participate, even on an informal basis, in this form of co-operation (...)." ²⁴

Consequently, only one of the above-mentioned directives was submitted to the Council and finally adopted by the latter²⁵. For the rest, the possibility of settling the free movement of persons within the framework of the Treaties had, in fact, been lost, and problems were dealt with in different fora, all of which used the intergovernmental formula²⁶. In this connection particular mention can be made, as frameworks for cooperation between the twelve Member States of

21; O'Keeffe (1992a), pp. 6-8; Fipkorn, in: Groeben/Thiesing/Ehlermann, Article 8a, para. 40-57, Timmermans, pp. 354-368.

²² See van den Brink/Vierhout, p. 384.

²³ E.g., the above quoted declaration on articles 13 to 19 SEA was commented by Commissioner Martin Bangemann as follows: "Our law students are told that to learn the law you need to read the statute-book. There we find a general declaration on articles 13 to 19 of the Single European Act: « ... [Declaration] ». We are therefore dealing with an area which has been specifically made an exception." OJ, Debates of the EP, No 3-401, 21 February 1991, p. 288.

²⁴ Commission of the European Community (1988), p. 43. However, it should be noted that the Commission in this communication explicitly excluded any prejudgment of the interpretation of the EEC Treaty. Nonetheless, see also the above-quoted remarks of Commissioner Bangemann.

²⁵ Directive 91/478/EEC on control and acquisition of firearms and ammunition.

²⁶ In the words of d'Oliveira, p. 170, activities of Member States have been "paracommunitarian; i.e. independent intergovernmental cooperation between Member States, oriented on the Community legal order, but outside the Community institutions which normally produce elements of the Community legal order."

the Community, of:

- Trevi
- Ad Hoc Group on Immigration
- EPC Group on Judicial Cooperation
- CELAD
- Mutual Assistance Group (MAG)
- Ad Hoc Group on Data Processing

Reference should also be made to Schengen as a framework for cooperation between a smaller number of Member States. Furthermore, some specific subjects which are of relevance to the free movement of persons were under discussion in a still wider framework, for instance, in the framework of the Council of Europe and the United Nations²⁷.

Because of the number of fora in which aspects of the circulation of persons were discussed, there was a need for a coordination of positions to be taken by the Member States in these talks. The European Council, meeting in Rhodes, therefore decided in December 1988 to set up a *Group of Coordinators on the Free Movement of Persons*, which had to report directly to the European Council. In addition, there was ministerial supervision in meetings of Immigration Ministers, Justice Ministers, ECOFIN (in the case of Customs cooperation), and the Foreign Affairs Council (EPC).

What follows is a summary of the most important fora and their principal activities. It should be noted, however, that the following description is by no means complete. The reader should therefore keep in mind that the framework of institutions, agencies and structures which aimed to promote cooperation in the fields of justice and home affairs was (and remains) far more complex than that mapped out below²⁸. Secondly, it should be stressed that much of the cooperation proceeded through informal and often secret channels. Consequently, reliable data only exists to a very limited extent.

B. Co-ordinators' Group on the Free Movement of Persons

The Co-ordinators' Group was set up by the European Council in Rhodes in 1988 to co-ordinate Member States' actions relating to the free movement of persons. It was composed of 12 high-ranking officials, a chairman and, on behalf

²⁷ See on the role of the Council of Europe *Hondius*.

²⁸ For a glossary of bodies and organisations dealing with justice and home affairs in 1993 see e.g., *Bunyan*, pp. 173-181; see also *Cruz*, pp. 15-25

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of the Commission, the vice-president. The Council Secretariat serviced the work of the Group, which met four or five times during each Presidency. The Group reported directly to the European Council. Its first task was the drawing up of a document which would contain two categories of measures, those indispensable for the suppression of internal borders and those which were desirable, but not indispensable; secondly, the document had to indicate the bodies responsible for adopting measures and set up a timetable²⁹. Adopted by the Group in Las Palmas and subsequently by the European Council in Madrid in June 1989, the report has since been called the "Palma Document". In fact, to a considerable extent it froze Community action on the free movement of people and replaced large sections of the Commission's 1985 White Paper.

Despite its political importance the Palma Document remained largely unknown to the public - national MPs included³⁰. This can be illustrated by the following example: The Palma Document was made public during a hearing of the Select Committee on the European Communities of the House of Lords in July 1989 and was ordered to be printed³¹. Several months later a copy of the same document was given to Dutch MPs by their Government. Interestingly, some of the Dutch MPs considered the document to be for *confidential* use only, even though they could have ordered the same information from *Her Majesty's Stationary Office* in London at any time. *Groenendijk*, therefore, concludes:

"The unclear status of the Palma Document - is it public or confidential information and what is its legal or political status? - did not stimulate public parliamentary debate on the document in the Netherlands. Instead, it made it harder for MPs and outsiders to the negotiations to recognize the political importance of the Palma Document."³²

It should be added that the Group of Coordinators was not an extra forum for debate. In particular, it was not responsible for the course taken by negotiations in the different fora. Therefore, the coordination provided by the group

²⁹ The document drew a distinction between: action at the external frontiers (competent fora: Ad Hoc Group on Immigration; Trevi; MAG); action at the internal frontiers (Ad Hoc Group on Immigration; Trevi; EC); action in connection with drug trafficking (EPC Group on Judicial Cooperation; Trevi; Council of Europe; UN; MAG); terrorism (Trevi; EPC); action in connection with admission to Community territory (Ad Hoc Group on Immigration); action in connection with granting of asylum and refugee status (Ad Hoc Group on Immigration; Council of Europe; UN); judicial cooperation in criminal and civil matters (EPC); goods carried by travellers (EC).

³⁰ Neither national parliaments nor the EP had been informed of the proceedings within the Coordinators' Group in general and the drafting of the Palma Document in particular.

³¹ See Appendix 5 to *Select Committee on the European Communities, House of Lords (1989)*.

³² *Groenendijk*, p. 394.

remained rather fragmentary³³. Secondly, the Group did very little to forward its second task, which was to give an impetus to the progress or conclusion of the proceedings in the various bodies.

C. Trevi³⁴

The Trevi Group was set up in 1975 as an intergovernmental body on police cooperation with the initial aim of co-ordinating efforts to combat terrorism³⁵. It expanded its brief in the mid-1980s to embrace all the policing and security aspects of free movement, including immigration, visas, asylum-seekers and border controls.

Trevi operated at three different levels: Ministerial (six-monthly meetings of Trevi Ministers); the Trevi group of "senior officials" (which also met six-monthly); and four "working groups": Trevi I (Terrorism)³⁶; Trevi II (Public order and Training)³⁷; Trevi III (Drugs and Organised Crime)³⁸; and Trevi 1992 (Abolition of Borders)³⁹. Trevi's methods of operation were fairly similar to the system used by the EC Council of Ministers. The EC Presidency country was *ex officio* the Trevi Presidency country for six months of an EC Presidency term. Trevi had no permanent staff. From 1989, the two states on either side of the "troika" sequence provided staff help, thus creating a staff support network.

³³ See de Zwaan, p. 346.

³⁴ A general overview of international police cooperation in western Europe is presented by *Benyon et al.*; see also *Bunyan*, pp. 15-36, and *Home Affairs Committee, HC (1990)*.

³⁵ According to Cruz, p. 18, the name of the group comes for the Trevi fountain in Rome where the first meeting of the group was held under the chairmanship of Mr Fonteijne.

³⁶ Trevi I was established by the Trevi Ministers on 31st May 1977. It was concerned with combating terrorism and was the only one with an *operational role*. It regularly analysed information held on known and suspected terrorist groups, with particular attention paid to their strategies and tactics. Procedures had also been developed for the rapid communication of information using Trevi's own security communications network. According to *Benyon et al.*, p. 154: "Information from informants suggests that it is in this field that Trevi has made a tangible impact, although for obvious reasons of security it is not easy to gauge how extensive this has been, nor is it possible to cite any concrete examples."

³⁷ Trevi II was concerned with police cooperation and the exchange of information on: police equipment, including computers/communications; public order and football hooliganism; police training; forensic science; other scientific/technical matters.

³⁸ Trevi III was established in Rome in June 1985 to look at organised crime and drug trafficking. This group prepared the way for the European Drugs Unit.

³⁹ Between 1988 and 1992 "Trevi 92" dealt with a wide array of more political topics related to the policing and national security implications of the reduction for border controls, as well as compensatory measures. In particular, Trevi 92 was responsible for drafting the 1990 Trevi Programme of Action mentioned below.

Except for Trevi 92, the EC Commission was not involved in the Trevi structure.

While a major part of the value of Trevi rested simply on its existence as a forum for developing contracts between representatives of the EC member states⁴⁰, it also made a number of more tangible contributions to policing and security cooperation in Europe. The Dublin Ministerial meeting of Trevi in June 1990 agreed to a programme of action for future cooperation⁴¹. This programme outlined a number of priorities for improved police cooperation. In order to combat terrorism, drugs trafficking and organised crime, exchanges of personnel and information would be increased and agencies involved would meet regularly to pool information. Among the specific measures were the appointment of liaison officers, the display of "wanted" posters, the further development of a rapid and protected communication system, the use of joint teams where appropriate, the promotion of suitable training and research, and the sharing of information.

The ideas outlined in the Dublin programme were given further impetus a year later at the Luxembourg summit when Chancellor Kohl of Germany proposed the creation of a European Criminal Police Office (Europol). As a result, the *Ad hoc Working Group on Europol* was set up in August 1991. Its work has led to the establishment of the *Europol Drugs Unit*, which has acted as a "forerunner" for *Europol*, and which operates regularly in The Hague since 1 January 1994⁴². Furthermore, preparatory work has been undertaken by the *Ad hoc Group* to draw up a *Convention on Europol*⁴³.

According to Bunyan, the work of the Trevi group was "shrouded in secrecy" from the time of its formation. For instance, it was not until 1989 that the first communiqué for public use was made available in the United Kingdom. Since, a written (ministerial) answer to British parliament followed each of the

⁴⁰ Over the two years 1991 and 1992 there were a total of 41 meetings on the three different levels. See Bunyan, pp. 185-186.

⁴¹ *Programme of action relating to the reinforcement of Police co-operation and of the endeavours to combat terrorism or other forms of organized crime*, 10 June 1990, printed in *Home Affairs Committee, House of Commons (1990) I*, pp. I-IV.

⁴² At their meeting held in Copenhagen on 2 June 1993 the Trevi ministers signed an agreement which provisionally established the functions, arrangements for data protection, staffing, accountability and finance of the EDU/Europol. See Bull. EC 6-1993, point 1.4.19. Disagreement on where to locate EDU delayed progress during mid-1993 and it was temporarily based in Strasbourg. At the European Council meeting on 29th October 1993 it was agreed to site the EDU/Europol permanently in The Hague. On the work and prospects of Europol in general and EDU in particular see Ernst Levy, *Was Europol im Kampf gegen Atomschmuggel leisten könnte*, in: *Frankfurter Allgemeine Zeitung*, 30 August 1994, p. 4.

⁴³ See Bunyan, pp. 24-33, and *Deutscher Bundestag (1994)*, p. 87.

six-monthly meetings of the Trevi Ministers⁴⁴. In addition, general observations in the EC Bulletin followed meetings of the Trevi Ministers. The negative assessment with regard to secrecy made by Bunyan seems to be confirmed by the fact that information on the structures, working methods and results of Trevi is often incoherent if not to say contradictory. In fact, according to Benyon *et al.*, one respondent to their survey had questioned whether even ministers themselves were aware "of all that goes on in the working groups". Other informants had concluded that working groups had made policy decisions without ministerial oversight, which might have cumulatively affected major aspects of policing and criminal justice without any political agreement or accountability⁴⁵. Altogether, Benyon *et al.* concluded:

"Many if not all of these groups and networks appear to have virtually no accountability whatsoever. They are rarely held answerable for their activities and few parliamentarians, or others such as journalists, seem even to be aware of their existence. And yet, through these structures of information about individuals is being exchanged and operations against individuals may indeed be discussed and planned."⁴⁶

Finally, mention should be made of a considerable overlap between the working groups within the Trevi-structure⁴⁷ as well as between Trevi and other fora such as the *Ad Hoc Group on Immigration*, the *EPC Group on Judicial Cooperation*, MAG, Interpol. Walker even observes a tendency of the various emergent international policing and criminal justice systems and arrangements to compete with one another. As a result: "Programmes may be pursued which, at best, are imperfectly coordinated, and at worst, hinder the realisation of each other's full institutional potential."⁴⁸

D. *Ad hoc Group on Immigration*

The *Ad hoc Group on Immigration* emerged from the Trevi framework. It was

⁴⁴ See Bunyan, p. 23. On the question of secrecy see also Benyon *et al.*, pp. 167 and 272.

⁴⁵ Benyon *et al.*, pp. 166 and 168.

⁴⁶ Benyon *et al.*, p. 285. I should add that this statement did not only refer to police-cooperation under Trevi but also to several other fora dealing with cooperation in the fields of crime combating and terrorism such as *Interpol*, the *Pompidou Group* (Council of Europe), *MAG (92)*, *GAFI (G15)*, or secret Networks, e.g., *Kilowatt*, the *Vienna Group* or the *Club of Berne*.

⁴⁷ Referring to criticism made by a number of respondents, Benyon *et al.*, p. 164, write: "(...) working groups were often thought to be unaware of each others' activities, let alone aware of the views of the politicians themselves".

⁴⁸ Walker, pp. 30-31. See also Bigo, pp. 167-169.

set up at a meeting of ministers responsible for immigration matters of the Member States and the Vice-President of the Commission in London on 20 October 1986. The meeting endorsed the objective of providing for free movement in the Community within the terms of the SEA⁴⁹.

Bringing together ministers from the departments of governments dealing with immigration issues, the ad hoc group differed from other aspects of the Trevi structure in that the Commission was allowed to attend its meetings in the capacity of observer. The secretariat was guaranteed by the General Secretariat of the Council of the EC. These facts notwithstanding, the participating governments, the United Kingdom, Ireland and Denmark in particular, resolutely maintained that it functioned entirely outside the ambit of Community institutions and law. The Ad Hoc Group was structured around six expert subgroups, namely on: Admission/Expulsion; Visas; Forged Documents; Asylum; External Frontiers; Refugees. As in the Trevi system, the subgroups involved civil servants and representatives from the national authorities responsible for enforcing immigration policy. They also organised their work to coincide with the six-monthly meetings of the ministerial level of the Ad hoc Group meetings, which itself coincided with the ministerial level of Trevi meetings.

According to the conclusions of the ministerial meeting in 1986, the Group was instructed, *inter alia*, to examine: improved checks at the external frontiers; the contribution which internal checks can make; the role of coordination and possible harmonization of the visa policies of the Member States; the exchange of information about the operation of spot check systems; measures to achieve a common policy on eliminating the abuse of the right of asylum. These "terms of reference" were redefined and expanded by the Palma Document in 1989.

Even though the Ad hoc Group acted in conditions of secrecy similar to those of Trevi, the output has been much more visible. Also, there were considerably more meetings. According to Bunyan, a total of 100 meetings of immigration ministers, officials, police and immigration officers were held from 1991 to 1992 only⁵⁰. The Ad hoc Group has been associated with efforts to promote a common list of visa countries across the 12 Member States and the introduction of carriers' liability legislation. Furthermore, it has elaborated the *Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the member States of the EC*, also known as the *Dublin*

⁴⁹ See Butt Philip, p. 175.

⁵⁰ See Bunyan, pp. 186-187.

Asylum Convention, signed on 15 June 1990⁵¹, and the draft Convention on the Crossing of External Borders⁵². Other activities, *inter alia*, included⁵³:

- the establishment of the Centre for Information, Discussion and Exchange on Asylum (CIREA), and of the Centre for Information, Discussion and Exchange on the Crossing of Border and Immigration (CIREFI)⁵⁴;
- the adoption of countless resolutions, recommendations, conclusions, e.g., on the harmonisation of national policies on family reunification, on manifestly unfounded applications for asylum, on countries in which there is generally no serious risk of persecution, etc.⁵⁵;
- feasibility study of a European Automated Fingerprint Recognition System (EURODAC)⁵⁶;
- production of a joint manual of European asylum practice, and the development of a consular manual giving guidance to consular offices on the issuing of visas.

Conventions excluded, the format which was chosen to produce the results of the cooperation was confusing; in particular, the results were not designed in a format which was clearly indicative of an act of public international law⁵⁷. However, resolutions, recommendations, conclusions, statements, etc. had been approved by the heads of government, and several documents even had deadlines by which time they should have been implemented in national law. Several authors have qualified some of these acts as *soft law*⁵⁸, i.e. "rules of conduct

⁵¹ Printed in Bull. EC 6-1990, point 2.2.2. Pursuant to article 22(3) the Convention enters into force on the first day of the third month following the deposit of the instrument of ratification, acceptance or approval by the last signatory State to take this step. On 1st June 1994 only seven EU Member States (Denemark, Greece, Italy, Luxembourg, Portugal, United Kingdom, France) had ratified the Convention. It is expected to enter into force in 1995. See Ameline, 14.

⁵² Discussions on most of the text of the draft External Frontiers Convention were concluded in 1991. Since then further progress on the draft Convention has been blocked as a result of Spanish objections to its application to Gibraltar. The draft Convention is not an officially published document. The unpublished version of this draft prepared by the *Ad hoc* Group on Immigration Secretariat is dated 24 June 1991 and referenced as SN 2528/91 WG1 822.

⁵³ See *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*, COM (94) 23 final, 23.02.1994, Annex II and III.

⁵⁴ The Interior Ministers at their meeting on 30 November 1992 approved the establishment of this Centre staffed by the General Secretariat of the Council, to monitor the common immigration policy of the 12 EC Member States and the crossing of borders.

⁵⁵ See e.g., Bull. EC 6-1993, point 1.4.18.

⁵⁶ Such a system already exists in several Member States and helps to avoid multiple asylum applications. The Twelve want to set up a European Automated Finger-print Recognition System, EURODAC, which will enable them to exchange and to compare their collection of finger-prints in order to find out, e.g., if an asylum-seeker has already been turned down in another Member State where he used a different identity.

⁵⁷ The legal status and effect of these acts has to be determined by the applicable rules of international law. Accordingly, the question whether a resolution, conclusion or recommendation is legally binding depends upon the intention of the parties and the terms of the act itself. See *Verdross/Simma*, pp. 335-345. The form or title chosen is not of itself decisive. See article 2 (1) (a) of the Vienna Convention on the Law of Treaties.

⁵⁸ See e.g. Alain Servantie, in: Groeben/Thiesing/Ehlermann, Article 30 EEA, para. 20.

which, in principle, have no legally binding force but which nevertheless may have practical effects⁵⁹.

As mentioned above, the work of the *Ad Hoc* Group was as secret as that of Trevi. Intergovernmental cooperation through the *Ad Hoc* Group therefore attracted many of the same criticisms that were directed against Trevi. General observations in the EC-Bulletin followed every six-monthly meeting of Immigration ministers. However, information after such meetings was often misleading if not to say false. For instance, a declaration adopted at the meeting of Immigration Ministers in Dublin on 15 June 1990 was published in the EC-Bulletin. The declaration regarded, *inter alia*, the Dublin Convention, signed by 11 Member States on the same date, and particularly referred to previous cooperation between the *Ad Hoc* Group and the United Nations High Commissioner for Refugees (UNHCR). According to the declaration:

"The United Nations High Commissioner for Refugees was consulted on the terms of the draft Convention and welcomed prospects for a constructive dialogue in this field."⁶⁰

In fact, the UNHCR had been "consulted" by the *Ad Hoc* Group only at the very last phase of the negotiations⁶¹, which even may have constituted a breach of the obligations laid down in article 35 of the Geneva Convention of 1951 on the Status of Refugees to cooperate with the UNHCR and to furnish it with information about proposed legal measures concerning refugees.

Generally, the closed negotiations in the *Ad Hoc* Group (as well as in Trevi and other *fora*) attracted criticism for the rather *one-sided expertise* among negotiators (officials of immigration and police departments). This is particularly disturbing for negotiations in the fields of justice and home affairs, because, as Weiler points out:

"Bureaucracies tend to suffer from what may be called the *banalization of suffering*. Faced with large numbers of human problems, these become «cases», the problems become «categories», and the solutions become mechanical."⁶²

⁵⁹ Snyder (1994b), p. 198. See also Snyder (1993), pp. 31-36, and Daniel Thürer, *The Role of Soft Law in the Actual Process of European Integration*, in: Olivier Jacod-Guillarmod (éd.), *L'avenir du libre-échange européen*, Zürich, pp. 129-139.

⁶⁰ Bull. EC 6-1990, point 2.2.1.

⁶¹ See Webber, p. 144.

⁶² Joseph H. H. Weiler, *Thou Shalt Not Oppress a Stranger* (Ex. 23:9): On the Judicial Protection of the Human Rights of Non-EC Nationals - A critique, in Schermers et. al., p. 251. It should be added, however, that Weiler made this remark to stress the importance of obtaining sufficient judicial protection in these fields.

E. EPC-Groups on Judicial Cooperation

Judicial cooperation took place under the framework for European Political Cooperation (EPC) established by the SEA⁶³. Work was divided between criminal and civil judicial cooperation groups. The groups' main role was to draw up a number of international conventions in criminal and civil matters and to promote the ratification by States who had not already done so, of conventions concluded in the Council of Europe⁶⁴. Both groups reported to the *European Political Committee*. This was a somewhat odd structure for members of the working groups were typically officials of justice departments, whereas the European Political Committee consisted of head officials of national departments for foreign affairs⁶⁵. The Political Committee therefore had to report to the meetings of Justice Ministers and not to the European Council. The Commission was involved as an observer and the work was supported by the EPC Secretariat⁶⁶. Like EPC in general, judicial cooperation in this forum was carried out in great secrecy. Furthermore, due to its complexity, cooperation in these fields lacked efficiency. Finally, many subjects had also been discussed in the Council of Europe which lead to a duplication of work⁶⁷.

F. CELAD

The European Committee to Combat Drugs was known by its French acronym CELAD ("Comité européen de lutte anti-drogues"). It was set up on a French initiative at the European Council in Strasbourg in December 1989. CELAD met four or five times during each Presidency with the remit to co-ordinate Member States' actions in the fight against drugs: prevention, drug addiction, drug

⁶³ See Alain Servantie, in: *Groeben/Thiesing/Ehlermann*, Article 30 EEA, esp. para. 15-17.

⁶⁴ See de Zwaan, p. 341, and d'Oliveira (1994), p. 262.

⁶⁵ See Alain Servantie, in: *Groeben/Thiesing/Ehlermann*, Article 30 EEA, para. 122.

⁶⁶ On the role of the Commission and the Secretariat see Alain Servantie, in: *Groeben/Thiesing/Ehlermann*, Article 30 EEA, para. 55-56 and 127-131.

⁶⁷ In the civil law field, action had also been taken in pursuance of article 220 EEC. This provides, *inter alia*, that "Member States shall, so far as necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards". Notable achievements have been the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (OJ No. L 299 of 31.12.1972) and the Rome Convention on the Law applicable to Contractual Obligations (OJ No. L 266 of 09.10.1980).

trafficking and common international action. It was made up of senior officials from Member States. The Commission was also present and the Council Secretariat provided support. The work of CELAD was reported directly to the European Council⁶⁸.

G. Mutual Assistance Group (MAG)

MAG was a longstanding group which dealt with activities at an operational level on Customs matters outside Community competence. For example, it co-ordinated Community-wide intelligence-gathering exercises to detect discrepancies unlikely to be picked up by one Member State acting alone. Since 1989, the focus of work had been centred on MAG (92), set up in 1989. The Group provided a forum for EC customs services to develop compatible single market plans in enforcement matters, e.g. to combat drug smuggling. MAG (92) came together in plenary sessions approximately every two months to prepare its recommendations and reports to the Directors General of the national Customs Services, but most of the work was done in sub-groups. The Commission was involved in the work of MAG (92) as an observer⁶⁹.

H. Horizontal Group on Data Processing

The Horizontal Group on Data Processing was set up to work on a draft Convention on the *European Information System (EIS)*⁷⁰. EIS is in real terms a Community-wide expansion of the *Schengen Information System*, which will be described further below⁷¹.

⁶⁸ As for judicial cooperation (see above) some aspects of the fight against drug addiction were also subject of action under the EEC Treaty. E.g., on 8 February 1993 the Council adopted under article 235 EEC a Regulation establishing a European drug monitoring centre (OJ No. L 36 of 12.02.1993, pp. 1-8). It should be noted that the new article 129 EC now provides that "Community action shall be directed towards the prevention of diseases, in particular the major health scourges, including *drug dependence*" (emphasis added by the author). Furthermore, on 22 October 1990 the Council, on behalf of the EEC, adopted a decision ratifying the 1988 UN Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (OJ No. L 326 of 24.11.1990, p. 56); see also the Council regulation of 13 December 1990 laying down measures to be taken to discourage the diversion of certain substances to the illicit manufacture of narcotic drugs and psychotropic substances (OJ No. C 357 of 20.12.1990, p. 1). Both, the Council decision and the Regulation were based on article 113 EEC.

⁶⁹ For further details on the work of MAG and MAG (92) see *Brown*, pp. 112-114.

⁷⁰ *Nanz* (1992), p. 130.

⁷¹ See footnote 84 and, *Bunyan*, p. 31-32, and *Deutscher Bundestag* (1994), p. 87.

I. The Schengen Group

According to *Cruz*, the Schengen Group originates from a large protest movement of lorry drivers in the spring of 1984, angry at the long queues at internal European borders⁷². Reacting to this situation, on 13 July 1984 Germany and France signed the *Saarbrücker Abkommen* which provides for the gradual suppression of the control of persons at the Franco-German border. These two countries subsequently contacted the Member States of the Benelux, whose internal borders for persons have been suppressed since 1960. The Schengen Group was thus created and less than twelve months after the *Saarbrücker Abkommen*, these five countries signed, on 14 June 1985, the Schengen Agreement on the gradual abolition of controls at the common borders (hereinafter: Schengen I)⁷³.

Schengen I is a short document and looks like a work programme containing the principal measures which the Five will have to put in place to realise the suppression of their internal borders⁷⁴. Only in the Netherlands was it subjected to parliamentary approval before it came into force on 2 March 1986. As for the others, they considered Schengen I as only a *declaration of intent*, and did not submit it for parliamentary ratification. In fact, according to *Bolten*, for a long time its existence was known only in select gatherings in the other four countries. For example, the French Ministry of Foreign Affairs had even failed to inform the Ministers of Justice and Home Affairs⁷⁵.

Immediately after the conclusion of Schengen I, negotiators began work on drawing up the supplementary agreement, but their activities remained virtually unknown to the public⁷⁶. Four working groups (Police and security; movement of people; transport; customs and movement of goods) reported to a *Central*

⁷² See *Cruz*, p. 3.

⁷³ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the gradual abolition of checks at their common borders. The text has been published in *Schermers et. al.*, pp. 547-551.

⁷⁴ Schengen I comprises thirty-three articles in two Sections; Section 1 "Measures applicable in the short term" (articles 1-16) and Section 2 "Measures applicable in the long term" (articles 17-33). The Section 1 measures were to be implemented by January 1986, those of Section 2 "if possible" (article 30 Schengen I) by January 1990. Section 1 relates primarily to methods of speeding up frontier crossings by people, goods and road and rail traffic. Section 2 deals with longer-term goals such as developing police cooperation, common visa policies and measures against illegal immigration.

⁷⁵ See *Bolten*, p. 9.

⁷⁶ For a detailed description of the negotiations see *Schutte*.

Negotiation Group (CNG), which prepared decisions for the political level, namely meetings of the Ministers and State Secretaries⁷⁷. The EEC Commission has had observer status at meetings of the CNG and meetings at the political level since 1988. The entire negotiating process was serviced by the existing Secretariat of the Benelux Economic Union, which was enlarged especially for this purpose. After five years of protracted negotiations, the *Convention applying the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders* (hereinafter: Schengen II) was finally signed in Schengen on 19 June 1990⁷⁸. Since, it has been ratified by all original contracting parties, i.e. the Benelux, France and Germany. It formally entered into force for these states on 1 September 1993⁷⁹. However, the signatory States have agreed upon a "two step" implementation procedure. In the first step, the *Schengen Executive Committee*, which is composed of one minister of each Member State, was formally established in September 1993 pursuant to article 139 (2) Schengen II. However, the core of the Convention will not be applied until the prior conditions for its implementation are fulfilled in the signatory States and checks at external borders are made effective⁸⁰. Pursuant to a declaration adopted by the Schengen Ministers at their Madrid meeting of 30 June 1993, this will require an affirmative decision taken by the Executive Committee⁸¹.

Numerous groups at the administrative and political levels have been working towards the application of Schengen II since signing the Convention in 1990, coordinating and directing the adaptation of national laws and practices⁸², and, after having adopted a final set of implementing measures, the Executive Committee on 14 December 1993 stated that the legal and political conditions

⁷⁷ These Working groups were divided into at least twelve Sub-groups. See *Cruz*, p. 4.

⁷⁸ Italy (1990), Spain and Portugal (1991) and Greece (1992) have since signed conventions to accede to this Convention, as well as to the 1985 Schengen Agreement. The authentic French, German and Dutch texts are published in the Netherlands Treaty Series, *Tractatenblad* (1990) No. 145. For an unofficial English translation see *Schermers et. al.*, pp. 552-605.

⁷⁹ *Deutscher Bundestag* (1994), p. 17. Subsequently Schengen II has also been ratified by Spain and Portugal. It entered into force for Spain and Portugal on 1 March 1994.

⁸⁰ *Joint statement concerning article 139 attached to Schengen II*. In addition, according to *Pandraud* (1994b), p. 7, Ministers of the Schengen Group have specified a set of conditions at their Luxembourg meeting on 19 June 1992. For a list of prerequisites to the implementation of Schengen II see also *Cruz*, p. 31.

⁸¹ See *Pandraud* (1994b), pp. 21-25. Agence Europe of 2 July 1993 (N° 6013), which reports on the Madrid meeting (pp. 7-8), does not mention this declaration.

⁸² See *van Ostrive* (1993), pp. 14-16, and *Butt Philip*, pp. 179-180.

for the implementation of Schengen II were now fulfilled⁸³. However, the Committee made one important reservation: Due to "technical" problems, the Schengen Information System (SIS), often called the "heart" of the compensatory measures⁸⁴, was declared not yet operational. In fact, problems with the SIS have occurred since 1992 and they have repeatedly led to a postponement of the formal deadline for the complete entry into force of Schengen II. It may be supposed that some governments, France for example, are using technical problems with SIS as a pretext, whereas it is in fact newly formed political opposition to the abolition of internal borders which is the true motive for objections⁸⁵. Therefore, it is far from certain whether Schengen II will come fully into force in 1994. In any event, it is very likely that, as a first step, the Convention will only be applicable in some Schengen States, thus creating a kind of "three-speed Europe", consisting of some EU Member States completely outside Schengen, some fully within Schengen and some in some kind of "twilight zone"⁸⁶.

Limited to nine Member States, the Schengen II covers most of the above-mentioned fields of intergovernmental cooperation in a single legal and institu-

⁸³ At its meeting of 14 December 1993, the Executive Committee, *inter alia*, agreed upon: a joint manual giving guidance to officials carrying out controls at external borders; common instructions for the consulates of the different Member States; a uniform format for visa valid for the entire territory of the Contracting parties pursuant to article 10 Schengen II (note: Germany and Portugal are already producing and using such visas); a list determining the third countries whose nationals must be in possession of a visa in all Schengen States ["negative list"]; a list of third countries whose nationals are to be exempted from this requirement in all Schengen States ["positive list"]; and a further list of countries whose nationals are subject to visa requirements in some Schengen States ["grey list"]. Only the first list is legally binding. See *Bericht des Bundesministeriums des Innern*, pp. 17-24, and *Pandraud (1994b)*, pp. 9-25.

⁸⁴ The SIS is a joint computerised information system containing information about persons and objects. According to article 92 (1) Schengen II, the designated authorities of the Contracting Parties may thereby have access to reports on persons and objects for the purposes of border checks and controls and other police and customs checks and for the purposes of issuing visas, the issue of residence permits, and the administration of aliens in the context of the application of the Convention's provisions relating to the free movement of persons. See articles 92 to 101 Schengen II; further *Baldwin-Edwards/Hebenton*, pp. 140-157; *Nanz (1994)*, pp. 106-107, and *Schattenberg*.

⁸⁵ See e.g. the remarks of *Bernd Schmidbauer*, in: *Agence Europe*, 16 December 1993 (N° 6130), p. 10; see also *Butt Philip*, p. 179, and *Philippe Keraudren*, *Réticences et obstacles français face à Schengen: la logique de la politique de sécurité*, in: *Pauly (ed.) (1994)*, pp. 123-144.

⁸⁶ Having failed three consecutive times to respect the agreed date of application since the beginning of 1993, the Executive Committee announced, after its meeting in Bonn on 27 June 1994, that the Convention would be applied as from 1st October 1994 in five Member States, namely Germany, Belgium, France, Luxembourg and the Netherlands. Spain and Portugal would follow shortly afterwards, but no indication was given as to when Greece and Italy would be ready. It is interesting to note that this date, which was mentioned at the press conference after the meeting, is not mentioned in the final communiqué. Another postponement cannot therefore be excluded. See *Migration News Sheet*, No. 136/94-07, p. 3.

tional framework. Its objective is thus to provide for a complete and integral approach to the problems to be overcome, once the controls at the internal frontiers have disappeared. Article 2 (1) is the central dispositive provision of Schengen II: "Internal borders may be crossed at any point without any checks on persons being carried out." Except for Title V, which deals with border controls regarding transport and goods, it deals almost exclusively with the consequences of this single paragraph⁸⁷. A broad analysis of all these provisions is not required for this research⁸⁸. Instead, I will restrict myself to the following four observations.

Firstly, as defined by *Carlos Westendorp*, Spanish Minister for European Affairs, Schengen is supposed to be a "self-destructing mechanism" that will "fade away from the EC" once the latter covers these issues⁸⁹. Schengen is thus supposed to act as a *forerunner* or *testing ground* with regard to a later abolition of internal borders in all the EC Member States. Ergo, political agreements and compromises obtained at the level of the Schengen group will very likely preempt successive agreements at the Community level⁹⁰, even though decisions made later at Community level will, *from a legal point of view*, not be pre-empted⁹¹. Yet, why should nine Schengen states "destroy" a mechanism on which

⁸⁷ The main elements of Schengen II are as follows: the institution of uniform controls and surveillance at the external frontiers, both in the interest of immigration and public safety and security; the measures with regard to the internal circulation of aliens (i.e. non-EC nationals), in particular with regard to refugees; police cooperation; judicial cooperation and assistance; harmonization and cooperation with regard to narcotics, drugs and firearms; the institution of computerized information exchange (SIS); the protection of privacy, both with regard to the automated exchange of information exchange and with regard to other forms of information exchange. Finally, Titles VII and VIII contain general procedural and final clauses.

⁸⁸ See *Meijers et al.*; *Nanz (1994)*; *O'Keeffe (1992b)*; *Pauly (ed.)*.

⁸⁹ *Agence Europe*, 2 July 1993 (N° 6013), p. 8.

⁹⁰ They may even create a precedent on principles which might be enshrined in the future Treaty as regards the free movement of persons.

⁹¹ Schengen II contains two provisions which determine the relationship of the Convention with EC law: articles 134 and 142. Article 134 provides that the "provisions of this Convention shall apply only in so far as they are compatible with Community law". Article 142 (1) provides:

"When conventions are concluded between the Member States of the European Communities with a view to completion of the area without internal frontiers, the Contracting Parties shall agree on the conditions under which the provisions of the Schengen Convention are to be replaced or amended in the light of the corresponding provisions of such Conventions.

The Contracting Parties shall, to that end, take account of the fact that the provisions of this Convention may provide for more extensive co-operation than that resulting from the provisions of the said Conventions.

Provisions which are in breach of those agreed between the Member States of the European Communities shall in any case be adapted in any circumstances."

Accordingly, e.g., at its meeting on 26 April 1994 in Bonn, the Schengen Executive Committee signed a protocol that provides for the replacement of the provisions on asylum in Schengen II once the *Dublin Asylum Convention* has entered into force. See *Abschlusskommunique der*

they have agreed after difficult negotiations if cooperation at the level of the Twelve and agreements resulting therefrom will not grant them similar advantages? Indeed, the *Dublin Convention*, the *Draft External Frontiers Convention* or the *Convention on the European Information System* and the corresponding chapters in Schengen II are strikingly similar, notwithstanding some divergences. Consequently, one may conclude that rendering cooperation-procedures in the fields of justice and home affairs at Community level "more democratic" may be a useless venture, if decisions have been "undemocratically" taken before this in the Schengen group.

This leads to the second remark: According to O'Keeffe, the lack of transparency with which the Convention was negotiated, and the failure to inform national parliaments led to considerable protest⁹². True enough, Schengen II was subjected to parliamentary approval in all Schengen States which have up to now ratified the convention⁹³. However, with the exception of the Netherlands, none of the ministers concerned were (publicly) questioned by their respective parliaments on the negotiations between 1985 and 1989⁹⁴. These were conducted in secrecy, and only in their final phase did German and Dutch MPs confidentially receive a draft of the Schengen Convention⁹⁵. In Germany, the drafts of the Schengen Convention were discussed between only four members of the Bundestag and representatives of the German Government at informal

Sitzung des Schengener Exekutivausschusses, Bonn, 26. April 1994, point 12. For a general description of articles 134 and 142 Schengen II see O'Keeffe (1992b), pp. 209-211.

⁹² See O'Keeffe (1992b), p. 188. I will not deal here with other deficiencies of Schengen which have been alluded to by numerous authors, e.g. the failure to give proper weight to pre-existing international conventions and agreements or the absence of a mechanism allowing for judicial or other review of the implementation of Schengen agreement policy and procedures. See the reports in Meijers et al.; O'Keeffe (1992b); Malangre, pp. 15-22, and the resolutions of the EP on the signing of the Convention implementing the Schengen Agreement of 23 November 1989 (OJ No C 323 of 27.12.1989, pp. 98-99) and on the entry into force of the Schengen Agreements of 19 November 1992 (OJ No C 337 of 21.12.1992, pp. 214-215).

⁹³ See article 139 (1) Schengen II.

⁹⁴ See Cruz, p. 6; van Iersel, pp. 374-378; Groenendijk, pp. 397-399.

⁹⁵ According to French Senator Paul Masson, in 1989, the French Government had even urged the Dutch Government to systematically avoid informing its national parliament, particularly as regarded the provisions of Schengen II currently being negotiated, as such a procedure might have set a precedent and could have prompted similar claims by the French parliament! See Cruz, p. 6. Only after the signing of Schengen II did French Parliament become active. A Senat screening committee issued an adverse report, in which it recommended a number of measures necessary in order to implement the agreement; see *Senat français* (1991). In the National Assembly, the EC Delegation (see below Chapter 3.B, pp. 67-70) drew up two reports: see Pandraud (1994b) and Pandraud (1993).

[illegible]

and secret consultations⁹⁶. Even though those MPs raised no major objections, which implied an informal consent of the main political parties with the Convention, informal and secret consultations between four MPs and government representatives were certainly no substitute for democratic and public debate. In this connection it is worth quoting Groenendijk who underlines the following dilemma national MPs faced when they tried to become involved in intergovernmental cooperation in general and the Schengen negotiations in particular:

"[MPs] ... have the choice between refusing information that cannot be made public, or receiving the confidential information with the implication that not making objections will be interpreted as consent to its contents. In either case the main policy decisions would have to be made well before any informed public discussion of the issues would be possible. Such dilemmas do not reinforce democracy."⁹⁷

Like the proceedings in the above-described intergovernmental fora, negotiations to Schengen II were "traditional" international negotiations in the sense that they were the exclusive competence of national executives. Consequently, only casually preparatory documents and drafts were submitted to national parliaments. Except for vague reports, such information was at best given confidentially - often only to a handful of highly select MPs. In any event, it was not debated in public. With regard to the criteria defined in the introduction to this research, it can therefore be concluded that: access to documents was strictly limited; the decision-making process remained fairly closed; opportunities for a parliamentary input were low; and parliamentary sanctions were restricted to a "yes" or "no" at the end of the negotiations. However, the negotiations regarding the Schengen Convention enjoyed a major advantage in that they were conducted within a single institutional framework: the coordination and final responsibility for the texts on all matters which concerned the abolition of internal borders was concentrated at the administrative level in the hands of a central group of negotiators who were responsible to one Group of Ministers and State Secretaries. This organization stood in contrast to the discussions on the abolition of border controls among Member States of the Community in the above-mentioned fora. The institutional structure of Schen-

⁹⁶ Note that the Foreign Affairs Committee ("*Auswärtiger Ausschuss*") of the German *Bundestag* always meets in private. Minutes of the proceedings are confidential. Furthermore, this Committee is a so-called "closed committee" ("*geschlossener Ausschuss*"). Members of the *Bundestag* who are not members of the Committee do not have access to its meetings. Finally, subjects which require particular confidentiality are discussed between the chairman of the committee, one representative of each parliamentary group, and government representatives (so-called "*Ausschussvorstandssitzung*"). See Weber-Panariello, § 14.1.C.

⁹⁷ Groenendijk, p. 398.

gen was therefore less complex. Also, it should be added that the absence of public debate in general and the lack of parliamentary participation in particular was not only a result of insufficient information, but also a result of media apathy and the initial absence of interest on the part of pressure groups, human rights associations, and MPs⁹⁸. Looking at the Dutch example, where in contrast to most of the other Schengen States the parliament slowly became concretely involved in the negotiation process and where eventually a public debate emerged, we see that the above-defined deficiencies were not necessarily an integral part of the intergovernmental model but also a consequence of national procedures, or, quite simply, of insufficient interest.

The third observation regards the problem of the extensive powers of the Executive Committee: On many points Schengen II requires the elaboration of further implementing rules. Article 131 Schengen II provides for the establishment of an Executive Committee, whose general purpose is to ensure that the Convention is implemented correctly, and which may take decisions (unanimously) on necessary measures⁹⁹. The Committee is not only assigned wide powers of supervision, interpretation and implementation of the Convention but is also empowered to act as a legislative: it has the power to adopt "rules", "detailed provisions" or "measures" and to make decisions on revising or amending the Convention¹⁰⁰. Working groups comprising "representatives of the Administrations of the Contracting Parties" will prepare the decision-making of the Executive Committee¹⁰¹.

Rule-making by such a procedure has some obvious disadvantages, first in terms of openness (limited access to working documents, action plans and draft decisions; confidential proceedings, limited publication of records and decisions, etc.¹⁰²), and second because the status of such rules remains fairly

⁹⁸ See the examples in Cruz, pp. 5-6.

⁹⁹ See articles 131 (2) and 132 (2) Schengen II.

¹⁰⁰ See, *inter alia*, articles 3, 8, 12, 17, 75, and 131 Schengen II. In pursuance of article 132(2) Schengen II the Executive Committee has drawn up its own rules of procedure on 18 October 1993. They have been revised on 14 December 1993. The rules of procedure have not been officially published. The unpublished version is dated 14 December 1993 and referenced as SCH/Com-ex (93) 1, 2. Rev.

¹⁰¹ Article 132 (4) Schengen II.

¹⁰² Schengen II contains no rule about publication of any decision of the Executive Committee. The Contracting parties only approved a non-binding Joint Statement concerning article 132, that they "shall inform their national parliaments of the implementation of this Convention". In *praxis* a vague press release follows every meeting of the Committee. Pursuant to article 3 and 12 of its Rules of Procedure, unless decided otherwise, the Executive Committee meets in private and minutes of the proceedings are confidential. Article 9(3) Rules of Procedures stipulates that

unclear¹⁰³. However, with regard to the first point, mention should be made of article 132 (3) Schengen II which provides that at "the request of the representative of a Contracting Party, the final decision of a draft on which the Executive Committee has taken its decision may be postponed until no more than two months after the submission of that draft". This "*terme de grace*" (*Groenendijk*) could thus be used for consultation with the national parliaments¹⁰⁴. Also, article 6(2) of the Rules of Procedure of the Executive Committee provides that decisions of the Committee will enter into force only after all the Member States have notified that the required parliamentary and judiciary procedures have been finalised to enable such decisions to take effect on their respective territories.

It should be added that, unless decided otherwise, according to articles 3(2) and 11(3) of the Rules of Procedures, the EU Commission may participate at meetings of the Executive Committee, of the CNG and of all Schengen working groups. Furthermore, pursuant to article 2(5) Rules of Procedure the Commission receives the provisional agenda for each meeting, which has to be sent to the Member States 21 days before the beginning of the meeting of the

the publication of (final) decisions adopted by the Executive Committee is determined by national rules. The Executive Committee may impose a confidentiality rule depending on the circumstances of the case. The Dutch bill concerning the ratification of Schengen II explicitly provides for the publication of decisions of the Executive Committee in the "*Tractatenblad*", which is the Official Bulletin for the Publication of Treaties. See *Groenendijk*, p. 396.

¹⁰³ See *Timmermans*, p. 366. As for the above-mentioned acts approved under Trevi etc., the legal status of acts of the Schengen Executive Committee will have to be determined, firstly, by the applicable rules of international law. Questions of direct effect and supremacy of such acts, however, may be considered solely a matter of national constitutional law. *Timmermans*, p. 366, argues that in some Member States rules enacted by the Executive Committee will "probably" be immediately applicable whereas in others they will have "the status of international agreements (in a simplified form), which are not automatically incorporated in the national legal order". The *van Ouirive (1992a)* report, p. 27, simply states that "the Executive Committee takes decisions which have the same legal force as the Convention itself and which in some cases are more important than it". Finally, it is of interest to note that the French *Conseil Constitutionnel* in its decision of 25 July 1991, has stated that: "... aucune stipulation de la convention [de Schengen] ne confère aux décisions de ce comité un effet direct sur les territoires des parties contractantes". *Décision n° 91-384 du 25 juillet 1991, JO, 27 juillet 1991, p. 10005*.

¹⁰⁴ In the Dutch bill concerning the ratification of Schengen II a provision was added to the effect that the drafts of all decisions of the Executive Committee that will be binding on the Netherlands will be made public as soon as the text has become final and will be submitted to parliament. In special circumstances, it may be submitted to parliament in a confidential way, e.g., if compelling reasons occur or if the draft is secret or confidential. The member of the Executive Committee representing the Netherlands, can only cooperate and participate in the decision-making process after prior parliamentary agreement. Tacit approval is presumed, unless one or both Chambers express the wish - within a period of 15 days - to give its/their approval expressly. This provision guarantees some parliamentary control on the decision-making process within the Executive Committee and in fact gives the Dutch parliament a right of co-decision, since decisions of the Executive Committee have to be taken unanimously. See *Groenendijk*, p. 396, and *Ouirive (1992a)*, p. 29. I should add that evidently no similar procedures have been formally established in the other Schengen States.

Executive Committee. Moreover, only items in respect of which the documents have been sent to the Member States (and to the Commission) at the latest by the date on which the provisional agenda is sent, may be placed on that agenda¹⁰⁵.

Finally notwithstanding the fact that cooperation among the Schengen States is taking place within a single institutional framework on a formal legal base, the gain of institutional transparency has been, if anything, rather moderate. Firstly, Schengen does not replace the other intergovernmental fora but runs parallel to them. Secondly, due to a proliferation of working groups within the Schengen framework, the structure of Schengen has become increasingly complex¹⁰⁶. Both phenomena create considerable impediments with regard to coordination on national and intergovernmental level. As Cruz points out:

"It ... appears that since the signing of the Agreement there has been a real proliferation of groups working towards its application, with, at the same time, an increase in the number of civil servants designated to the national delegation. Given that the various Schengen working groups often discuss issues dealt with by other intergovernmental fora of the 12 EC States, it would be not only desirable, but also logical that a systematic exchange of information be institutionalised among civil servants of the same country as well as among the different national delegations.

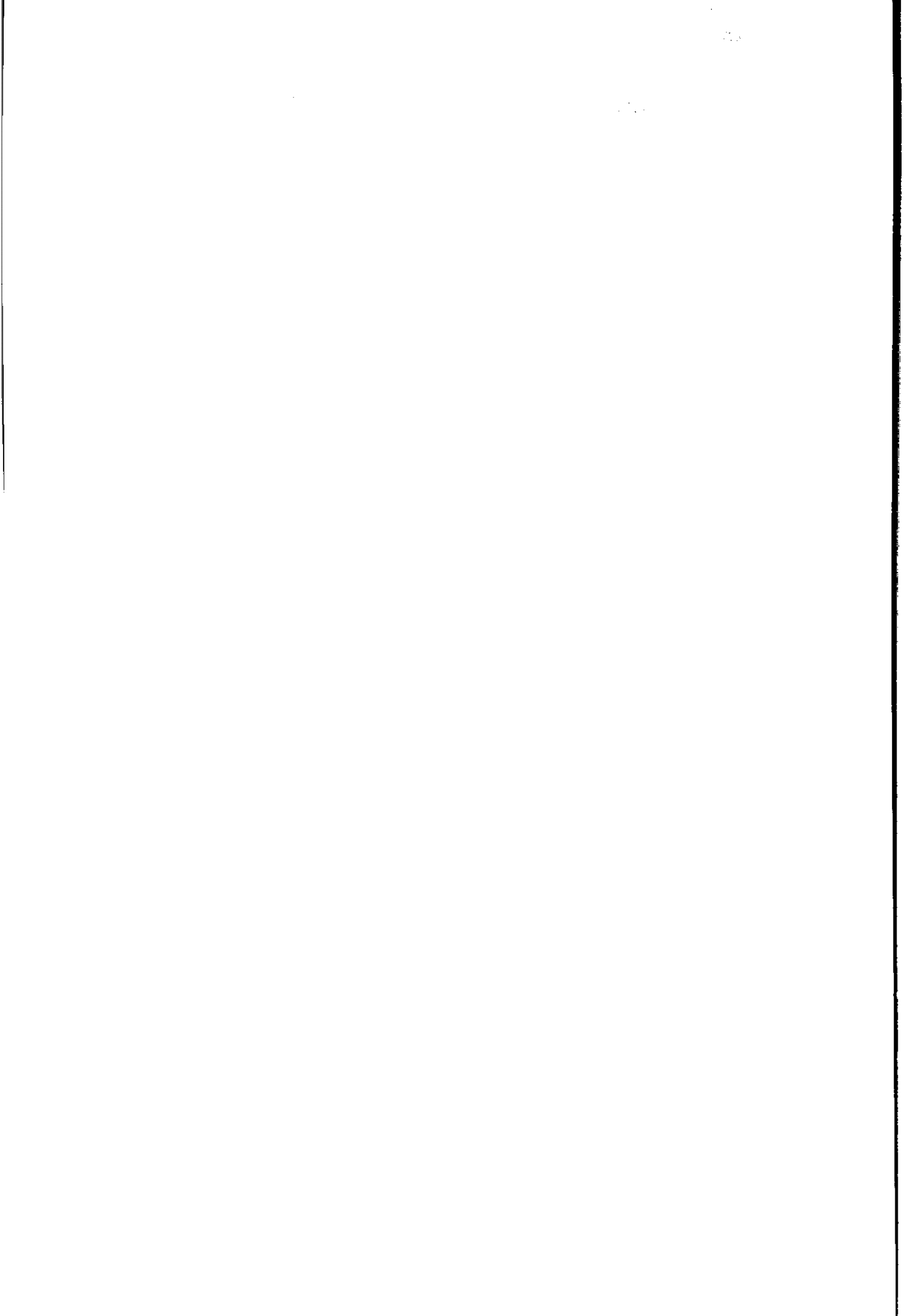
In reality, information exchange is seriously lacking as the different fora dealing with the same issues are often not well informed of what the others are doing, or find out rather late. What is even worse is that certain civil servants must sometimes participate in one meeting after another without having sufficient time to share information with their colleagues participating in other groups. Among certain delegations, there are civil servants who are members of all or almost all of the groups working on similar issues and are, as a result, far better informed than the others who participate, for example, only in the Schengen working groups. It has already happened more than once that a civil servant participating in a Schengen working group made a proposal in contradiction with a decision already taken in another intergovernmental body."¹⁰⁷

It goes without saying that not only parliamentary control but also ministerial oversight becomes increasingly difficult under such conditions.

¹⁰⁵ Article 2(3) Rules of Procedure of the Executive Committee.

¹⁰⁶ According to an unpublished organigramme on 1 September 1994 Schengen was structured as follows: Six working groups (Police and Security; Visa and Asylum; Judicial Cooperation; External Relations; Treaties and Regulations; Narcotics) and the SIS Steering Group report to the CNC, which prepares decisions for the Executive Committee. In addition there is a Permanent Administrative Committee (CAF). The working groups are divided in several permanent/ad hoc sub-working groups. The Secretariat of the Benelux Economic Union still serves as a Secretariat of Schengen.

¹⁰⁷ Cruz, p. 14.



J. Summary of Chapter 1

Cooperation among the EC Member States in the fields of justice and home affairs is closely linked to the objective set out in article 7a EC of establishing a common market without internal frontiers. However, even though it responded to a Community imperative, at least until 1993, cooperation on these matters evolved almost completely outside the Community legal and institutional order. As various authors have argued, the reasons for this had little to do with the lack of Community powers to draw up legislation in these fields¹⁰⁸; in reality, the intergovernmental path was taken because some EC Member States, the United Kingdom, Denmark and Ireland in particular, were unwilling to accept the Community approach in political highly sensitive areas such as immigration or asylum policy. Having little choice, the Commission "accepted" these preferences, thereby feeding the doubts as to the competence of the Community to legislate in these fields.

As claimed in the introduction, the result of the intergovernmental approach has been, so far, an ever-extending, increasingly complex and opaque patchwork of groups, organizations and facilities, differing in terms of their territorial remit, their area and the quality and intensity of the cooperation they pursue. After having portrayed some of the most important intergovernmental fora in Chapter 1, not much needs to be added to the introductory remarks regarding the complexity of the "system".

With regard to the other criterias established in the introduction observations made on Schengen above are transferable to virtually all the forms of cooperation described in Chapter 1. *Access to documents* being deliberated in the different fora was strictly limited, and *intergovernmental meetings* at administrative and political level were generally held *in private*. It was very difficult for national parliaments (and interest groups/NGOs) to find out when discussions were taking place, what was being discussed, what progress had been made, etc. Still today, it is difficult to find out what has been achieved and what is operational. In most cases, there was little or no previous consultation with the national parliaments for major meetings such as those of the Trevi and Immigration Ministers. *Chances for parliamentary input* at an early phase of decision-taking were thus low, and it was virtually impossible for matters to be

¹⁰⁸ Indeed, except for cooperation in the fields of police, crime combating or terrorism, article 8a EEC in connection with articles 100 or 235 EEC could have served as legal grounds for Community action in many fields dealt with intergovernmentally.

publicly debated in advance. Moreover, the legal and political status of documents was never clear: were they public, secret or confidential, and who decided this? MPs were therefore often faced with the dilemma: either they had to refuse to accept information which they would not be at liberty to pass on, or else they had to accept it on condition that they raised no objections. Public debate was thus rendered impossible. Finally, except for conventions, the outcome of the meetings was not formally submitted to parliaments for their approval, the Netherlands being the only exception¹⁰⁹. In any event, (treaty) texts resulting from intergovernmental cooperation were not subject to amendment by national parliaments¹¹⁰.

The comments above on Schengen include some criticism with regard to the extensive competences and the future working methods of the Schengen Executive Committee. It is therefore of interest to note that both the *Dublin Asylum Convention* and the 1991 *Draft External Frontiers Convention*, which may at a later stage gradually replace the corresponding sections of Schengen II, provide for the establishment of similar Committees. It is striking that these committees always have three functions: *legislative*, as they adopt "rules" and "provisions", and amend or supplement the conventions; *executive*, as, for example, they decide on the suspension of an application by a country, extended application etc.; and *judicial*, as they are entrusted with the *interpretation* of the respective conventions¹¹¹. As for the Draft External Frontiers Convention, it

¹⁰⁹ See Robles Piquer, p. 11.

¹¹⁰ E.g., Dutch Parliament had sent its delegate back to the Schengen negotiating table with instructions to renegotiate with a view to securing a number of supplementary protocols to improve the agreement. The subjects to be covered were, *inter alia*: greater openness and parliamentary control over the Executive Committee, and jurisdiction of the European Court of Justice to settle disputes between the Schengen machinery and citizens or between the contracting States. Further, it wanted the European Court of Justice to be assigned jurisdiction to give preliminary rulings on the interpretation of the agreements and protocols and of action by bodies set up pursuant to them. However, the Dutch Parliament afterwards ratified the agreement without any supplementary protocols. See *Outrive (1992a)*, p. 29. However, as mentioned above, the Dutch government accepted an amendment to the Ratification Bill, granting parliament a right of information and approbation before decision-taking in the Executive Committee.

¹¹¹ E.g., article 18 of the Dublin Asylum Convention provides that:
"(1) A Committee shall be set up comprising one representative of the Government of each Member State.

The Committee shall be chaired by the Member State holding the Presidency of the Council of the European Communities.

The Commission of the European Communities may participate in the discussions of the Committee and the working parties referred to in paragraph 4.

(2) The Committee shall examine, at request of one or more Member States, any question of a general nature concerning the application or interpretation of this Convention.

The Committee shall determine the measures referred to in Article 11(6) and Article 13(2) and shall give the authorization referred to in Article 17(2) [temporary suspension of the Convention in one Member State].

should further be added that the EC Commission has recently put forward a new proposal in which the EC Council will replace the Executive Committee¹¹².

Furthermore, Chapter 1 has offered evidence that the intergovernmental model in the version used by the EC Member States not only thwarts parliamentary scrutiny, it also hampers executive supervision. Intergovernmental cooperation in the fields of justice and home affairs has become the "battle-ground of bureaucracies" on a European scale. However, while a similar statement could probably be given with regard to the role of state officials in national politics, in justice and home affairs in particular, it seems far more accurate for intergovernmental cooperation. This phenomenon has been described by *Robles Piquer*, MEP, as follows:

"It is noticeable how much *senior officials* of Ministries of Justice and Internal Affairs, originally not diplomats, can behave like diplomats in old style in intergovernmental context, i.e. they are able to build up a position of power without the legitimacy they would have if they were politically accountable to elected bodies.

This is the core of the problem. Intergovernmental co-operation by its very nature leads to positions of power for officials. ... National bureaucracies are becoming too big and too complicated for ministers to keep an eye on everything, although they are deemed politically responsible for everything officials do or fail to do. Ministers of Justice and Interior are more preoccupied with their respective national problems and have little time to devote to international problems, of which they have only a superficial knowledge and which they often delegate to their staff. Frequently, when a minister does attend meetings, he is briefed in the plane on the way to the conference. It goes without saying that, as a consequence, his responsibility for the decisions taken is much more theoretical than practical. Only in the field of asylum policy has there been any change in recent years."¹¹³

One may add to this that ministers are more preoccupied with their respective national problems because that is where parliamentary (and public) scrutiny and debate still takes place. Or, in short, because parliaments do not control their governments, ministers do not control their officials.

Finally, mention should be made of the participation of the EP in the fields of justice and home affairs prior to the introduction of Title VI TEU. Even though it has never resigned itself to the state of affairs concerning cooperation in the fields of justice and home affairs, the EP's possibilities to participate in

The Committee shall adopt decisions revising or amending the Convention pursuant to Articles 16 and 17.

(3) The Committee shall take its decisions unanimously, except where it is acting pursuant to Article 17(2), in which case it shall take its decisions by a majority of two-thirds of the votes of its members.

(4) The Committee shall determine its rules of procedure and may set up working parties.

The Secretariat of the Committee and of the working parties shall be provided by the General Secretariat of the Council of the European Communities."

¹¹² See below, Chapter 2.B.1, p. 46.

¹¹³ *Robles Piquer*, p. 12.

these have been limited. As described above, European Community legislation in these fields continued to be exceptional with the result that a formal consultation of the EP was generally bypassed¹¹⁴. The EP was thus restricted to the use of more general measures such as the drawing up of reports, the passing of resolutions, or oral and written questions. However, the EP has been remarkably active in considering topical problems in these areas. Practically all subjects falling under the scope of free movement of persons, asylum, immigration, racism, xenophobia etc. have been covered by numerous in-depth reports and resolutions and countless parliamentary questions¹¹⁵.

In addition, two information procedures were established especially for matters of justice and home affairs. Firstly, the EP's Committee on *Civil Liberties and Internal Affairs*¹¹⁶ was generally briefed every six months on the most important results of the activities initiated by the ministers responsible for immigration affairs, though the quality of the information varied considerably (from extremely scant to extremely detailed)¹¹⁷. Secondly, on 7 May 1990 the General Affairs Council decided that the president of the Council responsible for immigration affairs and the presidents of the EP's committees concerned should begin meeting every six months. Such meetings have taken place after the half-yearly assembly of the competent ministers. However, according to van den Brink/Vierhout they have been of questionable merit. Information has been supplied only *ex post* to a highly select number of MEPs; it had usually already reached the EP through other informal channels¹¹⁸.

In addition, the EP's *Committee on Civil Liberties and Internal Affairs* operated on an informal basis in advance of the introduction of the Maastricht arrangements through reports from the *EC Commission* on the activities of the intergovernmental working parties and ministerial meetings. It did not receive

¹¹⁴ The few Community acts adopted in these fields were generally based either on Articles 100, 113 or 235 EEC, which, at the most, provide for *consultation* of the EP.

¹¹⁵ See e.g., the above quoted resolutions on Schengen or the reports by *Malangre* and *Outrive* (1992a) and (1993), *Pauly (ed.)* (1994), Annexe IX, pp. 325-367, quotes 39 written questions by the EP with regard to Schengen only.

¹¹⁶ The Committee was established in 1991. It was given responsibility, *inter alia*, for all matters relating to: human rights problems and civil liberties in the European Union; the security of free movement of persons; asylum policy; the fight against racism; immigration policy and policy towards nationals of third countries; the fight against international crime, drug trafficking and fraud; police cooperation. customs cooperation. Up to 1991 many of these fields were covered by the Committee of Legal Affairs and Citizens' Right. See *European Parliament*, Rules of procedure, Annex VI: Powers and responsibilities of standing committees, XIV.

¹¹⁷ *Malangre*, p. 26, and *van den Brink/Vierhout*, p. 388.

¹¹⁸ *Van den Brink/Vierhout*, p. 388.

any documents by right from these bodies, but informally the Committee received the resolutions and recommendations of some meetings from the President-in-Office, after they had been agreed¹¹⁹. Also, the Presidency began to attend at least one committee meeting during his term of office, giving a fairly full report and taking part in one or two hours of questioning¹²⁰.

Following *Groenendijk*, the outlined activities of the EP had, in particular, three effects¹²¹. First, they emphasized the civil liberties issues raised by the Schengen Convention and other intergovernmental agreements and conventions such as the Dublin Convention. Second, the EP brought attention to the interests of unrepresented groups and interests, such as the third country immigrants, who were put to oneside in the early years of the negotiations¹²². Third, the EP constantly questioned the legitimacy of the intergovernmental model of legislation and underlined the democratic deficit of the latter. On the other hand, *Groenendijk* believes that the EP's activities have seldom given rise to new information on the status of the secret negotiations.

¹¹⁹ Even though the Committee has repeatedly requested draft texts of such texts before final adoption, it has never received anything in advance. See *Copy of a Letter sent by the Chairman of the European Parliament's Committee on Civil Liberties, Mr Amédée Turner, MEP, to the President in Office of the Twelve Ministers Responsible for Immigration, Mrs Brite Weiss*, in: *Select Committee on the European Communities, HL (1993)*, p. 23.

¹²⁰ Amédée Turner, Chairman of the EP's Committee on Civil Liberties and Internal Affairs, in: *Select Committee on the European Communities, HL (1993)*, Evidence, p. 19. According to Turner, p. 20, the President of Schengen has also attended a number of the Committee meetings.

¹²¹ See *Groenendijk*, pp. 399-400.

¹²² See e.g. *Report of the Committee on Civil Liberties and Internal Affairs on the harmonization within the European Communities of Asylum Law and Policies*, Rapporteur: Patrick Cooney, 5 November 1992, A3-337/92/Part A and B (PE 201.540/A and B/fin.). In this report Cooney defined the EP's role as follows: The EP "must be involved as the vindicator of the asylum seeker as an individual whose need of protection must always take precedence over the expedient needs of state policy" (Report Part B, p. 2).

Chapter 2. Title VI TEU: A new Framework for Cooperation in the Fields of Justice and Home Affairs

A. The new legal framework

Title VI TEU, commonly referred to as the "Third Pillar" of the European Union, places cooperation for the first time among the Twelve in the fields of justice and home affairs (CJHA) on a formal treaty basis¹²³. Title VI TEU comprises ten articles: articles K and K.1 to K.9 TEU¹²⁴. Article K simply provides that: "Cooperation in the fields of justice and home affairs shall be governed by the following provisions." Hence, in principle CJHA is not governed by earlier provisions of the Treaty, in particular those relating to the European Communities¹²⁵. Instead, articles K.1 to K.8 describe how that cooperation is to be carried out in a number of defined policy areas regarded as "matters of common interest". Article K.9 establishes a procedure for transferring some of these matters to the EC Treaty, thus placing them within Community competence. Mention should also be made of the new article 100c EC, by which one small aspect of justice and home affairs - parts of the visa policy - has been placed within the competence of the European Community, as opposed to remaining within the competence of the Member States acting in cooperation under the Third Pillar¹²⁶.

¹²³ The Three-Pillar structure of the Union has been widely discussed and I shall not repeat this discussion here. Instead, see *Constantinesco*, esp. pp. 253-264; *Dehousse* (1994), pp. 6-12; *Everling*, pp. 1056-1077; *Müller-Graff*, pp. 494-506. However, *Weiler* (1993), pp. 49-62, rejects the Three Pillar concept and suggests the theological metaphor of *Trinity*: "Neither Unity nor Three Pillars: rather a Trinity of Community, Justice and Home Affairs, and a Common Foreign and Security Policy in which «oneness» and «separateness» co-exist simultaneously" (p. 62).

¹²⁴ In addition, two declarations adopted by the Conference have been attached to the TEU, one on *Asylum*, the other on *Police cooperation*.

¹²⁵ However, article K.8(1) TEU applies, for the purpose of operating Title VI, several provisions of the EC Treaty: articles 137, 138, 139 to 142, 146, 147, 150 to 153, 157 to 163 and 217 EC. Secondly, article K.8(2) TEU provides that all expenditure incurred in the framework of Title VI TEU must be born either by the Member States or by the Community budget. If the Council decides that operational expenditure to which the implementation of provisions agreed on under Title VI TEU gives rise, is to be charged to the budget of the EC, the budgetary procedure laid down in the EC Treaty shall be applicable.

¹²⁶ Article 100c(1) EC requires the Council to determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States. The Council is to act by unanimity; but in recognition of the possible difficulty of reaching unanimous agreement, article 100c(2) EC enables temporary decisions to be taken by qualified majority, and article 100c(3) EC provides that from 1 January 1996 all decisions are to be taken by qualified majority. Article 100c(3) EC also requires the Council, before 1 January 1996, to adopt measures relating to a uniform format for visas. In each case the Council may only act upon the initiative of the Commission and after consulting the EP.

Article K.1 TEU contains an *exclusive* enumeration of areas which Member States, for "the purpose of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community", are to be regarded as "matters of common interest". The areas described as matters of common interest by article K.1 TEU are the following:

- "1. asylum policy;
2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
3. immigration policy and policy regarding nationals of third countries;
 - a) conditions of entry and movement by nationals of third countries on the territory of Member States
 - b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment;
 - c) combating unauthorized immigration, residence and work by nationals of third countries on the territory of Member States;
4. combating drug addiction in so far as this is not covered by (7) to (9);
5. combating fraud on an international scale in so far as this is not covered by (7) to (9);
6. judicial cooperation in civil matters;
7. judicial cooperation in criminal matters;
8. customs cooperation;
9. police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol)."

Article K.3 TEU stipulates different forms and methods of cooperation which Member States shall use in areas referred to in article K.1. First, article K.3(1) TEU provides that in these areas, "Member States shall *inform* and *consult* one another within the Council with a view to coordinating their action. To that end they shall establish collaboration between the relevant departments of their administrations." Second, article K.3(2) TEU envisages several forms of cooperation going beyond the mere exchange of information and consultation. This provision starts by specifying who has the right of initiative, i.e. the right to propose action using any of these forms of cooperation. In the areas referred to in article K.1(1) to (6), the right of initiative belongs to any *Member State* or the *Commission*. In the areas referred to in article K.1(7) to (9) the right of initiative is restricted to any *Member State*¹²⁷. Article K.3(2)(a) to (c) lists the following forms of cooperation: first, the adoption of *joint positions* and the promotion of any cooperation contributing to the pursuit of the objectives of the Union; second, the adoption of *joint action* and the decision on *measures im-*

¹²⁷ Article K.3(2) TEU.

plementing joint action; and third, the drawing up of conventions¹²⁸.

Cooperation under Title VI takes place outside the Community procedures, and the resulting decisions and acts do not form part of Community law *stricto sensu*¹²⁹. However, the Third Pillar is not without a legal quality: its substance is public international law¹³⁰. Furthermore, article K.9 TEU provides for the possibility of transferring the areas referred to in article K.1(1) to (6) TEU into European Community competence:

"The Council, acting unanimously on the initiative of the Commission or a Member State, may decide to apply Article 100c of the Treaty establishing the European Community to action in areas referred to in Article K.1(1) to (6), and at the same time determine the relevant voting conditions relating to it. It shall recommend the Member States to adopt that decisions in accordance with their respective constitutional requirements."

Thus, pursuant to article K.9 TEU the unanimous decision of the Council to transform an area of common interest into a Community matter of article 100c EC requires adoption by the Member States in accordance with their respective constitutional requirements. The mechanism provided for in article K.9 TEU is therefore not much more than a simplified procedure for amending the Treaties¹³¹.

The European Court of Justice is given no jurisdiction in respect of Title VI TEU itself. The only provision of Title VI TEU listed in article L is the one enabling conventions concluded under article K.3(2)(c) TEU to confer jurisdiction on the Court "to interpret their provisions and to rule on any disputes regarding

¹²⁸ Article K.3(2)(a) to (c) provides: "The Council may: ...

- (a) adopt joint positions and promote, using the appropriate form and procedures, any cooperation contributing to the pursuit of the objectives of the Union;
- (b) adopt joint action in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged; it may decide that measures implementing joint action are to be adopted by a qualified majority;
- (c) without prejudice to Article 220 of the Treaty establishing the European Community, draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements.
Unless otherwise provided by such conventions, measures implementing them shall be adopted within the council by majority of two-thirds of the High Contracting Parties.
Such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down."

¹²⁹ See *Müller-Graff*, p. 507-510.

¹³⁰ Although, as underlined by *Müller-Graff*, pp. 495-503, due to its institutional, functional and procedural connections to the EC and Community Law the characterisation of the Third Pillar simply as public international law may not be appropriate. See also *Snyder (1994a)*, pp. 7-9.

¹³¹ See article N(1) TEU.

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their application, in accordance with such arrangements as they may lay down". The Member States therefore have discretion whether or not to provide in a convention for the European Court of Justice to have jurisdiction, and if so, to prescribe the extent of such jurisdiction and the arrangements applicable to it. However, since by virtue of article M TEU the Court retains jurisdiction in respect of the Community Treaties, it can properly determine the extent of the Community powers. Accordingly, in case of dispute, the Court can be expected to determine the boundary between the competence of the Community under EC Treaty and that of the Member States under Title VI TEU¹³².

The above-described provisions give rise to numerous questions and comments, both from a legal and a political perspective. However, four points seem to be of particular interest in the light of what has been stated in Chapter 1.

First, article K.1 TEU describes rather accurately the aspects of justice and home affairs on which the Member States have cooperated hitherto. In fact, pursuant to the Preamble of the TEU, the objective of the Third Pillar is "to facilitate the free movement of persons, while ensuring the safety and security of their peoples" through cooperation on justice and home affairs. Thus, in substance the catalogue does not add anything new to what has been subject to intergovernmental cooperation in the fields of justice and home affairs among the Twelve before Maastricht¹³³.

Second, article K.1, in conjunction with articles K.3 and K.9 TEU, draws a clear distinction between matters that may be "communitarized" at a later stage and those which will remain within the sphere of "pure" intergovernmentalism. Only the areas referred to in article K.1(1) to (6) TEU may, pursuant to article K.9 TEU, be transferred into European Communities' competence, and only in these areas has the Commission been entrusted a right of initiative¹³⁴. Hence, there seems to be a list of policy areas which are to be given "preferential" treatment under the new Title VI TEU. However, taking a closer look at the areas to which article K.1(1) to (6) TEU is referring, it is striking to note that they all concern matters which - even without making use of the rhetoric of a "Eurofanatic" - may be considered as of *Community competence* anyway. In fact, except for "judicial cooperation in civil matters", they were all

¹³² See *Dehousse (1994)*, pp. 11-12.

¹³³ As pointed out by *Weiler (1993)*, p. 49, footnote 1, CJHA is a "euphemism covering most particularly the cluster of issues concerning the status of third country nationals in the Community."

¹³⁴ Article K.3(2) TEU.

to be found among the policies identified by the Commission in its 1985 White Paper as matters which should be harmonized through Community legislation (Directives) in order to achieve the objectives of the internal market. Sure enough, several provisions in Title VI TEU explicitly state that they are "without prejudice to the powers of the European Community" as laid down, for example, in articles 57, 100, 113, 129, 209, 220 or 235 EC¹³⁵. Furthermore, pursuant to article B TEU, maintaining "in full the «acquis communautaire»" has become an explicit objective of the Union, and article M TEU excludes the possibility of Title VI affecting the EC Treaties, or the subsequent Treaties and Acts modifying or supplementing them. Legally speaking, Title VI TEU does not therefore generally exclude areas of article K.1 TEU from being treated within the framework of the EC-Treaty¹³⁶. Nonetheless, *de facto* this may be exactly the outcome, the hidden agenda of some Member States having supported the establishment of Title VI TEU¹³⁷. In any event, for the areas listed in article K.1(1) to (6) TEU, the Commission's right of initiative is not much more than minimal and even article K.9 TEU may be considered not as a "bridge" but as an additional "barrier" for the "communitarization" of matters of justice and home affairs. Indeed, if Member States had wished to "communitarize" aspects of justice and home affairs in these areas, in most cases, if not to say in all cases, they could have done so without referring to article K.9 TEU¹³⁸.

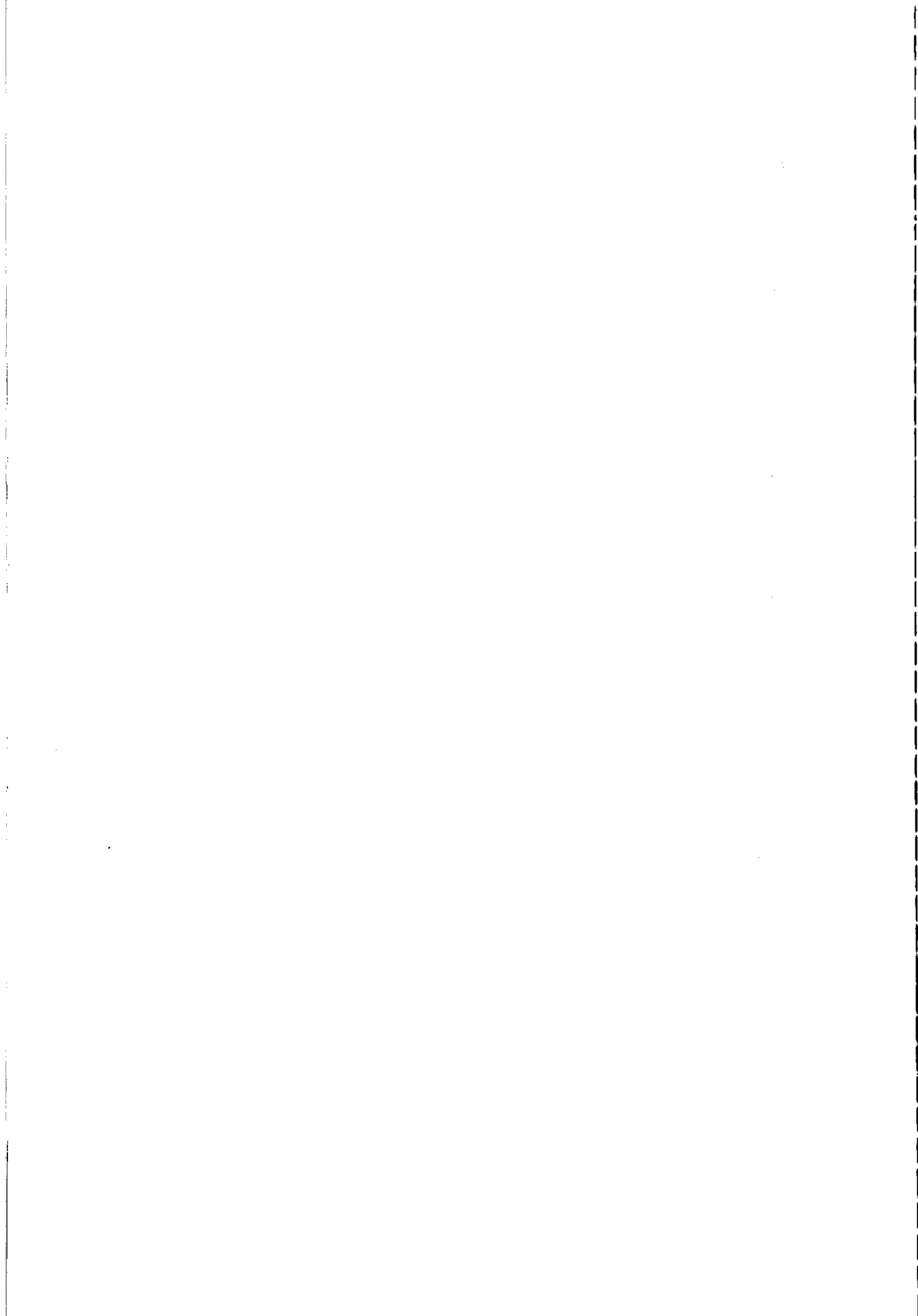
Title VI TEU could therefore be described as *janus-faced*. In the first place, as will be shown below, it puts intergovernmental cooperation within the institutional framework of the European Union and, as a result, moves these policies closer to the Community institutions. In the second place, however, it adds even *more doubts as to the existing competences* of the Community to legislate in the fields of justice and home affairs and, in any event, it makes the

¹³⁵ See articles K.1, K.3(2)(c) and K.4(1) TEU

¹³⁶ See Müller-Graff, pp. 503-506.

¹³⁷ In fact, the idea of providing for cooperation on justice and home affairs, in a part of the Treaty separate and distinct from the provisions modifying the Community Treaties, was a British one, and the resulting Treaty structure corresponds essentially to the original British conception. See Hendry, p. 297, footnote 8. On the negotiations to Title VI TEU see also Cloos *et. al.*, pp. 492-495.

¹³⁸ As suggested in Chapter 1, the absence of Community legislation on these matters was caused not so much by the lack of Community competences, but rather by the reticence of (some) Member States to accept the Community approach in these sensitive areas. In fact, if, in exceptional cases, all EC Member States agreed on the need to legislate in fields of justice and home affairs at Community level they did so, and they didn't hesitate to do so on the grounds of articles 100 or 235 EEC. The above mentioned establishment of the European drug monitoring centre or the adoption of the EEC Directive on control and acquisition of firearms and ammunition are telling examples.



delimitation of these fields from the decision-making competence of the Community extremely troublesome¹³⁹. Eventually, it may well strengthen the intergovernmental approach even in fields which used to fall within Community competence and it may create a presumption to be defined as: "*in dubio pro intergouvernementalism*"¹⁴⁰. Indeed, it is interesting to recall what *Timmermans* has written with regard to intergovernmental cooperation on these matters before the establishment of Title VI TEU:

"Where all Member States agree on the necessity of a common action on the level of the twelve and the Community enjoys the necessary power to act, the Community as such should act, not its Member States by negotiating agreements in an intergovernmental framework. To accept a free option for Member States between using the Community framework or an intergovernmental approach would be incompatible with basic principles of the Community legal system."¹⁴¹

Is not this free option for Member States, between using the Community framework or an intergovernmental approach, exactly what the new Title VI TEU now provides?¹⁴² Thus, what at first sight looks like the preferential treatment for some areas could instead be interpreted as an additional "safety clause" to keep these fields under (inter-)governmental control¹⁴³. However, what is new about the Third Pillar is that where all Member States agree upon the necessity of common action by the Twelve in an area described in article K.1 TEU, Member States will presumably be bound to use the institutional framework of the Union as laid down in Title I and VI TEU¹⁴⁴.

¹³⁹ See e.g., *Curtin*, p. 24.

¹⁴⁰ *Nanz* (1992), p. 133, for instance, writes: "Der grösste Teil der Themen aus den Bereichen Inneres und Justiz ist im Rahmen des Artikels K geregelt. Dies bedeutet einmal, dass es sich nicht um EG-Kompetenzen handelt, sondern um Bereiche intergouvernementaler Zusammenarbeit."

¹⁴¹ *Timmermans*, p. 362. See also *Schwartz*, in: *Groeben/Thiesing/Ehlermann*, Article 220, para. 43-69.

¹⁴² Theoretically, there remain limits to the extent to which Community institutions may abstain from the use of Community powers, one of these being the scope of article 175 EC, another being the possible potential of article 138b EC, which summarizes the interinstitutional role of the EP. See *Müller-Graff*, pp. 505-506. Similarly, the *Commission* could use the infringement procedure provided by article 169 EC, and sue the Member States jointly for having violated their Treaty obligations. See *Dehousse* (1994), p. 11, footnote 37.

¹⁴³ This becomes even more evident if we turn to the areas listed in article K.1(7) to (9) TEU. By contrast to the areas described in article K.1(1) to (6) TEU, these areas do fall quite clearly outside Community competence. For instance, the EC Treaty does not give the EC legal competence in respect of policing. Consequently, entrusting the Commission a right of initiative in these areas or providing for the possibility to transfer these matters to the EC Treaty would have signified a substantial change. Instead, this has been explicitly excluded by article K.3(2) and K.9 TEU.

¹⁴⁴ *Nanz* (1992), p. 133.

Thirdly, pursuant to article K.7 TEU, the "provisions of this Title shall not prevent the establishment or development of closer cooperation between two or more Member States". This provision is particularly aimed at the Schengen Convention and the respective implementing measures. However, article K.7 TEU places a limit on such close cooperative arrangements. They may exist only "in so far as such cooperation does not conflict with, or impede, that provided for" in Title VI TEU. The intention is to give precedence to action under Title VI TEU; and, according to *Hendry*, "the implication appears to be that, once agreed, cooperative action by the Twelve would override any incompatible arrangements concluded between only some of them."¹⁴⁵

This sounds good in theory. Reality, however, may be more complicated. For instance, even if a decision was taken at the level of the Twelve, provisions agreed previously under Schengen may not be fully replaced, for the latter may deal with the same subject from different points of view; they may be applicable under different circumstances, or they may be supplementary. The last case is especially likely to occur as (some) Schengen States may, due to broader consensus, agree on more extensive cooperation in a particular field¹⁴⁶. Thus, it could often be unclear whether agreements are incompatible at all, for they may constitute a *lex specialis*. Secondly, according to *Hendry*, the implication of article K.7 TEU "appears" to be that cooperative action by the Twelve would override any incompatible arrangements concluded between only some of them. However, even though this is what the wording may suggest it is not absolutely certain whether article K.7 TEU actually constitutes a clause of precedence. If not, a solution would have to derive from international public law, in particular from the *lex posterior* principle as embodied in the Vienna Convention on the Law of Treaties¹⁴⁷.

Of course, none of the questions raised in the previous paragraph are really new. Yet they are particularly disturbing in this context, for they may occur quite often and they may occur in politically and legally highly sensitive fields. These questions will primarily be dealt with by national executives and courts. The result of this will inevitably be diverging interpretations in the Member States, a lack of clarity about legal force, and uncertainty about which

¹⁴⁵ *Hendry*, p. 309.

¹⁴⁶ See also article 142(1)(2) Schengen II, quoted above in footnote 91.

¹⁴⁷ See article 30 of the Vienna Convention, and *Wolfram Karl*, *Treaties, conflicts between*, in: *Rudolf Bernhardt*, *Encyclopedia of Public International Law*, Vol. 7, Elsevier Science Publishers, Amsterdam 1984, pp. 467-473.

regulation has precedence.

Finally, as described in Chapter 1, a confusing element of intergovernmental cooperation in the fields of justice and home affairs has been the lack of coherence with regard to the legal status and effect of acts adopted. Title VI TEU will not put an end to this *legal disorder*. Instead, article K.3 TEU provides for various "new" forms of cooperation, and only "conventions" drawn up pursuant to article K.3(2)(c) TEU will be clearly indicative of a (binding) act of public international law. By contrast, the terms "joint positions" and "joint actions" are very general and seem to be appropriate for CSFP (Title V TEU), i.e. *foreign policy*, rather than for cooperation in the areas covered by Title VI TEU¹⁴⁸. Are these forms of cooperation intended to be legally binding? Will they be public or confidential? Will they require parliamentary ratification or not? Similar questions will occur with regard to the measures decided by the Council implementing joint actions and conventions in pursuance to article K.3(2)(b) and (c) TEU. The Treaty is silent on all these questions¹⁴⁹.

According to Müller-Graff, "it seems most likely that a joint position in the context of the third pillar has to be understood as a joint declaration or recommendation without a legally binding effect"¹⁵⁰. With regard to *joint actions* the author notes that on a linguistic level the term parallels the wording of article J.3 TEU, providing for *joint action* in the context of the CFSP. Yet the adoption of a joint action as set out in article K.3 TEU is not attributed expressly the same consequence as the adoption of the joint action in article J.3(4) TEU¹⁵¹. Müller-Graff therefore concludes: "... comparing the wording of articles J.3 and K.3 TEU, it seems doubtful that a joint action in article K.3 TEU - lacking the specific language of article J.3(4) TEU - can be understood to have a committing effect on the Member States in that sense"¹⁵². However, this conclusion cannot be generalized. Instead the question whether or not an act in the form of a *joint action* (or *joint position*) is binding in international law will primarily depend upon the intention of the parties and the terms of the *concrete act itself*¹⁵³. The

¹⁴⁸ The terms and tools established under Title VI TEU indicate that the Treaty was drafted by diplomats, and that Title V TEU had served them as a model.

¹⁴⁹ See Cloos *et. al.*, pp. 504-507.

¹⁵⁰ Müller-Graff, p. 509.

¹⁵¹ Article J.3(4) TEU provides: "Joint actions shall *commit* the Member States in the positions they adopt and in the conduct of their activity." [Emphasis added].

¹⁵² Müller-Graff, p. 509.

¹⁵³ See above footnote 57.

legal effect of such acts within the national legal orders will depend upon national constitutional law.

Again, all these questions will be dealt with primarily by national executives and courts, and again the result of this will inevitably be diverging interpretations in the Member States and a lack of clarity about the legal force of such acts. Whilst this may (still) be acceptable in the fields of "traditional" foreign affairs, it seems to be far less so in the fields of justice and home affairs. Indeed, legal uncertainty in justice affairs seems almost a contradiction in terms.

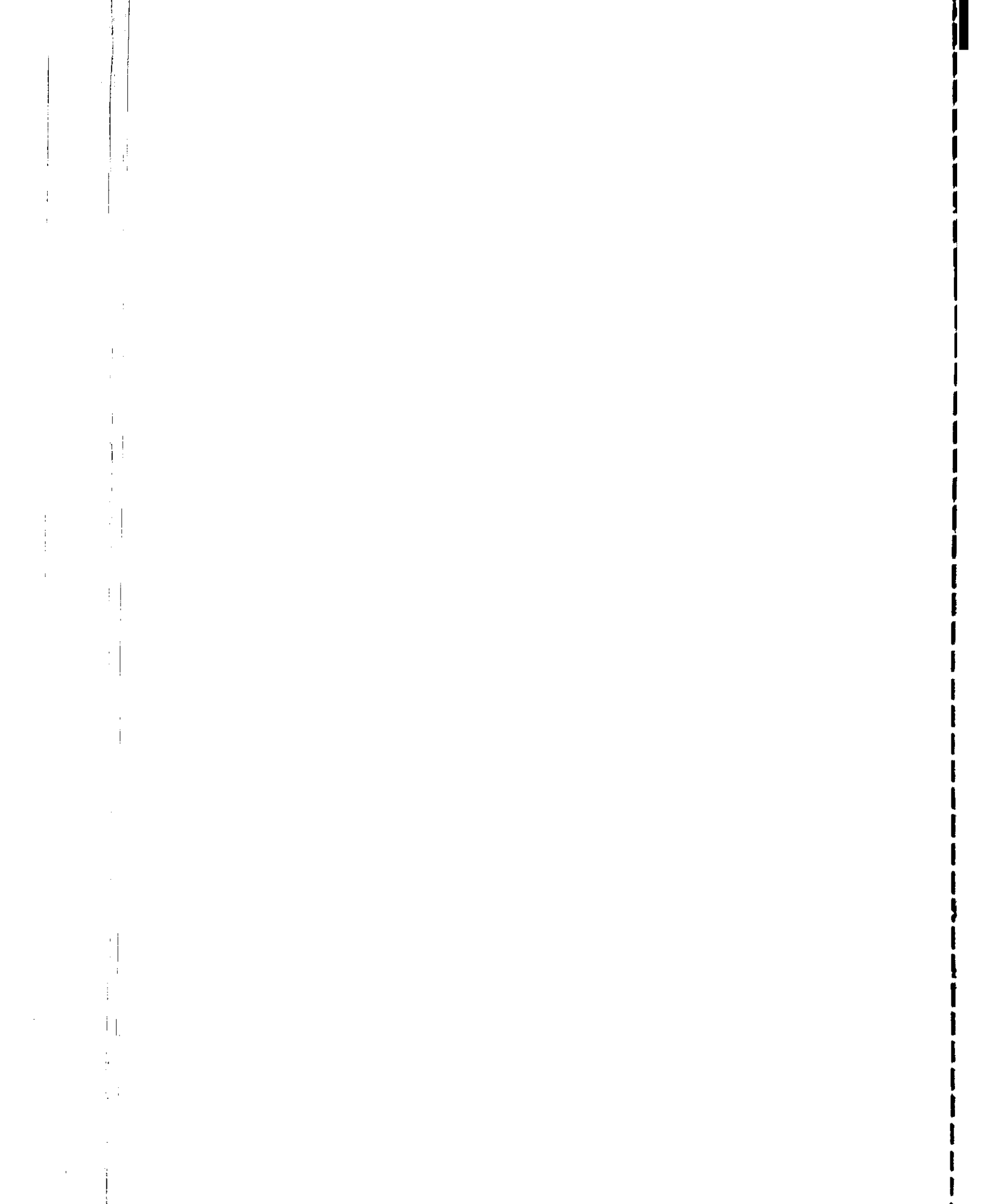
Presumably, acts adopted under the new Title VI TEU will, from the lawyer's point of view, often have to be qualified as "soft law"¹⁵⁴, thus changing the situation very little in respect to the situation as it was prior to 1993. Interestingly, Title VI TEU even establishes a *legal and institutional framework for the systematic use of such a regulatory technique*. In practice, this may lead to the result that action under Title VI TEU, when taken, will be *increasingly discretionary and opaque*, and that it will be subject only with difficulty to democratic and legal controls¹⁵⁵. Parliamentary participation at national level, for instance, often depends on the *legal effect* of the respective international agreement under negotiation¹⁵⁶. Usually, only agreements binding in international law are subject to prior parliamentary information and consultation or to approval, even though the political impact of legally non-binding acts may often be equivalent to that of a treaty instrument proper¹⁵⁷.

¹⁵⁴ See above Chapter 1.D, pp. 16-17. In fact, Member States may continue to use the same formats of acts as before. E.g., at its meeting in Luxembourg on 20 June 1994, the Justice and Home Affairs Council adopted a *resolution* on limitations on admission of third-country nationals to the Member States for employment. On the one hand, Member States have pledged to endeavour to seek to ensure by 1st January 1996 that their national legislation conforms with the principles of this resolution, and, on the other, the text stipulates that these same principles "are not legally binding on the Member States, and do not afford a ground for action by individual workers or employers". See *Migration News Sheet*, July 1994, No. 136-07, p. 1. At its 29/30 November 1993 meeting the Council adopted, *inter alia*, a *recommendation* on crimes against the environment, a *recommendation* on the liability of organisers of sporting events, *conclusions* concerning racism and xenophobia, and a *declaration* on extradition. See *European Report*, 1 December 1993 (No. 1906), 1/4.

¹⁵⁵ See *Snyder (1994)*, pp. 13-14.

¹⁵⁶ See below Chapter 3.

¹⁵⁷ See *Christian Tomuschat, Der Verfassungsstaat im Geflecht der internationalen Beziehungen*, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)* 36/1978, pp. 7-58, esp. 32-34.



B. The new institutional framework

"It is the central feature of the pillared approach, ... that we wanted to extend into these areas, that we wanted the European Union, but the thing we had to assure was that the Commission would not lead it, it would not be subject to the European Parliament, not subject to the European Court".¹⁵⁸

When in the future all the Member States agree on the necessity for cooperation among the Twelve in an area described in article K.1 TEU, such matters will have to be pursued within the institutional framework of the European Union established under Title I and VI TEU¹⁵⁹. This new framework is thus supposed to eliminate the networks and institutions described above insofar as they comprise *all twelve* Member States. As underlined by Müller-Graff, the simplification and the concentration of these contacts and cooperation together into one single institutional framework is, in practice, "the most important step taken in establishing" the Third Pillar¹⁶⁰.

Pursuant to article D TEU, the *European Council* shall provide the Union "with the necessary impetus for its development and shall define the general political guidelines thereof". As for the role of the EP, the Council, the Commission and the European Court of Justice, article E TEU provides that these bodies "shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the [EC] Treaties ... and, on the other hand, by the other provisions of this Treaty". Title VI TEU represents some of these "other provisions". The objective of article E TEU is thus to draw a clear line between the actions of these institutions within and outside the European Communities. In exercising functions pursuant to Title VI TEU, these institutions therefore act according to specially defined procedures, and not according to Community law and procedures.

However, as mentioned above, article K.8(1) TEU contains a list of EC Treaty provisions applicable to the provisions relating to the areas referred to in Title VI TEU. Significantly, article K.8(1) TEU applies to the operating of the Third Pillar, *inter alia*, articles 142, 151 and 162 EC. Thus, even when acting

¹⁵⁸ Kenneth Clarke, Secretary of State for Home Affairs, in: *Home Affairs Committee, House of Commons, Intergovernmental Co-operation in the fields of Justice and Home Affairs, Minutes of Evidence, Wednesday 21 April 1993, HC (1992-93) 625-i, p. 9.*

¹⁵⁹ See article C and K.1 TEU.

¹⁶⁰ Müller-Graff, p. 496.

under Title VI TEU, the EP, the Council and the Commission will follow a course of conduct according to their ordinary rules of procedure.

1. Council of Interior and Justice Ministers

Title VI TEU puts an end to the different forms of ministerial meetings among the Twelve as described in Chapter 1. The new *Council of Interior and Justice Ministers* is the body within which the Member States are to act formally under Title VI TEU. It is part of the "Council of Ministers" under the TEU and will, therefore, be serviced by the Council Secretariat. The Secretariat will assist in making sure that papers are available and circulated, in making the practical arrangements, in preparing minutes, and so forth.

Pursuant to article K.4(3) TEU, the Council shall act unanimously, except on matters of procedure and in cases where article K.3 TEU provides for other voting rules. Article K.3(2)(b) TEU provides that the Council may decide "that measures implementing joint action are to be adopted by a qualified majority"¹⁶¹, and, according to article K.3(2)(c) TEU, measures implementing conventions drawn up under the Third Pillar "shall be adopted within the Council by a majority of two-thirds of the High Contracting Parties".

Thus, in contrast to the executive committees established under previous (draft) conventions on matters of justice and home affairs, the Council, which is supposed to replace such committees, will not necessarily have to act unanimously when deciding on implementing measures¹⁶². However, article K.3(2)(c) TEU only sets up a presumption that measures to implement any convention concluded under Title VI shall be adopted by a majority of two-thirds of the parties; the convention itself can override that presumption by stipulating different decision-making rules. Similarly, article K.3(2)(c) TEU only sets up a presumption that these measures will be adopted "within the Council"; again, this presumption can be overridden by the terms of the convention itself.

The first meeting of the new Council of Justice and Interior Ministers took place in Brussels on 29/30 November 1993. At this meeting the Council

¹⁶¹ Article K.4(3) TEU provides that: "Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in article 148(2) of the Treaty establishing the European Community, and for their adoption, acts of the Council shall require at least 54 votes in favour, cast by at least eight members."

¹⁶² See, for instance, article 26 of the (revised) draft External Frontiers Convention, proposed by the Commission (COM (93) 684 final, 10 December 1993). See also articles 2(5), 5(3), 8(5), 10(4), 11(3), 15(3), 16, 20(2), 21(2), 22(3) of this draft Convention which all give power to the Council to adopt implementing measures, e.g. detailed rules, to give effect to the Convention.

agreed, *inter alia*, on a *priority work programme for 1994* for all the areas within its responsibility¹⁶³. In addition, the Council prepared an *action plan in the fields of Justice and Home Affairs* which had been requested by the European Council on 29 October 1993¹⁶⁴. Both documents were subsequently presented to the European Council and were agreed on by the latter at its Brussels meeting on 10/11 December 1994¹⁶⁵.

The *work programme*, which fits into the more general *action plan*, contains a fairly detailed list of "*priority actions*" and "*other actions*" to be taken by the Council in the fields of: (1) *asylum and immigration*¹⁶⁶; (2) *police co-operation, customs cooperation and cooperation in the fight against drugs*¹⁶⁷; and (3) *judicial cooperation*¹⁶⁸. Furthermore, the programme provides for working structures (working groups) to be set up in these fields. The objective of the measures proposed by the Council is to "enable progress to be made towards the creation, in accordance with the provisions of the Treaty, of an area without internal frontiers thanks to satisfactory security arrangements, and a considerable boost to be given to cooperation between the Member States in these areas, to the benefit of the citizens of the Union"¹⁶⁹. *Work programme* and *action plan* can thus be compared with the above-described "Palma Document". They are of

¹⁶³ Spain maintained formal reserves on several topics though it was established that the document before the Council did not give rise to any objections in principle.

¹⁶⁴ See Bull.EC 10-1993, point 1.5.

¹⁶⁵ See Bull.EC 12-1993, point 1.8. Both *work programme* and *action plan* are not officially published documents. The unpublished version of the *work programme* is dated Brussels, 2 December 1993 and referenced as *European Union - The Council*, 10655/93 (incl. Annex 10655/93), JAI 12 (hereinafter: *Council, work programme*); the unpublished version of the *action plan* is dated Brussels, 2 December 1993 and referenced as *European Union - The Council*, 10684/93, JAI 11 (hereinafter: *Council, action plan*).

¹⁶⁶ In these fields, the following areas are, *inter alia*, defined as *priority actions*: Monitoring the implementation of the Dublin Convention; Eurodac; harmonized application of the definition of refugee within the meaning of article 1.A of the 1951 Geneva Convention; definition of minimum guarantees in procedures for examining asylum applications; signing and completion of proceedings on application on the draft external frontiers Convention; consultation and cooperation on the execution of expulsion measures. See *Council, work programme*, pp. 2-4.

¹⁶⁷ In these fields, the following areas are, *inter alia*, defined as *priority actions*: Conclusion of *Europol Convention*; finalization of the *Convention on the Customs Information System*; completion of work on the *Convention on the European Information System*. See *Council, work programme*, pp. 5-10.

¹⁶⁸ In these fields, the following areas are, *inter alia*, defined as *priority actions*: examination of possible improvements in the area of extradition; mutual judicial assistance; enforcement of foreign measures (disqualification from driving, confiscation); protection of the financial interests of the Union; action against international organized crime; possible extension of the scope of the Brussels Convention to family matters and succession. See *Council, work programme*, pp. 11-15, and *Council, action plan*, pp. 14-15.

¹⁶⁹ *Council, action plan*, p. 4 [emphasis added].

considerable *political importance*. Nonetheless, like the "Palma Document", they have not been officially published by the European Union.

2. The new working structure

Article K.4(1) TEU provides for the setting up of a *Coordinating Committee*, the so-called "K.4 Committee", consisting of senior officials¹⁷⁰. The K.4 Committee replaces, *inter alia*, the previous Coordinators' Group on the Free Movement of Persons, which has ceased to exist¹⁷¹. The K.4 Committee is supposed to bring into effect a more structured (channelled) communication between the ministries and law enforcement agencies responsible, and to streamline the link between policy-making and financial resources¹⁷². However, the K.4 Committee does not displace COREPER¹⁷³, which retains its role in preparing the Council's work alongside the K.4 Committee. Quite obviously, there is a potential for conflict of powers between these two bodies inherent in this construction.

As indicated above, work under the aegis of the K.4 Committee has been organised by the Council into three sectors: immigration and asylum; police and

¹⁷⁰ In addition to its coordinating role it shall be the task of the K.4 Committee to:

- give opinions for the attention of the Council, either at the Council's request or on its own initiative;
- contribute, without prejudice to Article 151 of the Treaty establishing the European Community, to the preparation of the Council's discussions in the areas referred to in Article K.1 and, in accordance with the conditions laid down in Article 100d of the Treaty establishing the European Community, in the areas referred to in Article 100c of that Treaty." (Article K.4(1) TEU).

¹⁷¹ See d'Oliveira (1994), p. 263, and Cloos *et. al.*, p. 509.

¹⁷² The establishment of Title VI TEU in general and of the K.4 Committee in particular may also entail a more structured communication between (and within) the responsible ministries at national level. E.g., in France government's position in CJHA (and Schengen) is now being coordinated by the "*Secrétariat général du Comité interministeriel pour les Questions de Coopération économique européenne (SGCI)*". The SGCI has a staff of about 140 persons and is placed under the direct authority of the Prime Minister. In the past, it has already coordinated French position in Community affairs very efficiently. French Prime Minister, *Edouard Balladur*, has therefore decided to extend SGCI's competences as follows:

"La mission du S.G.C.I. est étendue aux sujets du titre VI du traité sur l'Union européenne, notamment en ce qui concerne la définition des positions et des actions communes et l'élaboration des instruments juridiques et des textes communautaires.

A ce titre, le S.G.C.I. est chargé de préparer de façon interministérielle la position française tenue dans les réunions du Conseil de l'Union européenne, du COREPER, du K 4, des groupes directeurs et des différents groupes de travail du conseil. A cette fin, il recueille les propositions des différents ministères et, en cas de désaccord entre les ministères, il soumet le problème à l'arbitrage du Premier ministre." Furthermore, the French representative in the K.4 Committee is a member of the SGCI. See *Premier Ministre*, Circulaire du 21 mars 1994 relative aux relations entre les administrations françaises et les institutions de l'Union européenne, JO, Lois et Décrets, 31 mars 1994, 4783-4785.

¹⁷³ Article 151 EC is expressly saved by the second indent of article K.4(1) TEU.

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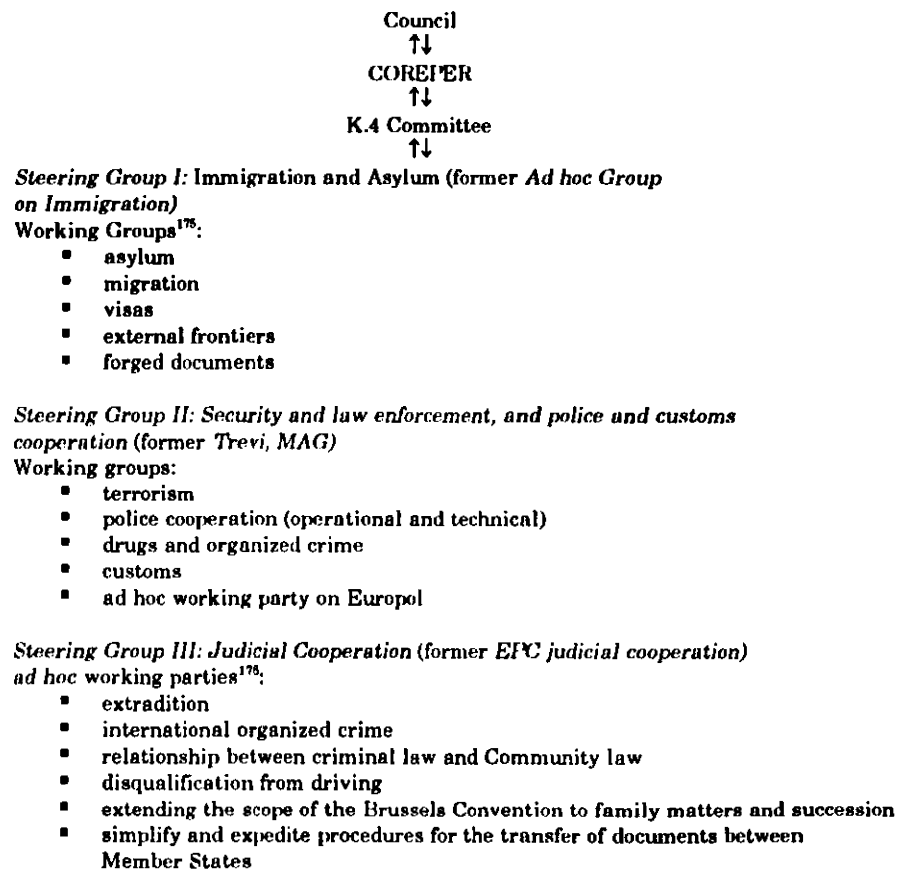
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customs-cooperation; judicial cooperation. Each sector has a *senior Steering Group* which proposes a work programme/timetable to the K.4 Committee each year, and monitors progress within the respective working groups. In practice, the three *Steering Groups* comprise the same senior officials who previously coordinated the various working groups under Trevi, the *ad hoc Group on Immigration*, MAG and EPC Judicial Cooperation. The latter fora have thus been merged into the K.4 structure. Each *Steering Group* is served by several permanent/*ad hoc* working groups. The new working structure can be described as follows¹⁷⁴:



¹⁷⁴ See Council, *work programme*, pp. 4, 10, 13 and 15.

¹⁷⁵ In addition CIREA (Centre for Information, Discussion and Exchange on Asylum, and CIREFI (Centre for Information, Discussion and Exchange on the Crossing of Border and Immigration) will continue their work.

¹⁷⁶ In its working programme for 1994 the Council considered that the setting up of *permanent groups* was not yet an issue but that it should be re-examined in the light of the experience gained when the new structures were in operation. Therefore, the setting up of permanent working groups, both on criminal and civil judicial cooperation, at a later stage is very likely.

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However, not all the previous arrangements among the Twelve in the fields of justice and home affairs have been merged into the K.4 structure. For instance, CELAD will continue to work outside this framework, and the *Horizontal Group on Data Processing*, which is examining the possibilities of the creation of the EIS, reports directly to the K.4 Committee.

3. The role of the Commission

Pursuant to article K.4(2) TEU the Commission "shall be fully associated with the work in the areas referred to in" Title VI TEU. Accordingly, the Commission is now officially and institutionally involved in CJHA, and it has been given the right to attend and participate in all meetings (at all levels) held in applying Title VI TEU. However, this largely reflects the practice already followed before the Maastricht Treaty.

Legally speaking, the upgrading of the Commission's role is limited: its (partial) right of initiative is shared with Member States, and unanimity is not required to alter its proposals in the few instances, where majority voting is possible¹⁷⁷. Most significantly, the Commission is not given the task of implementing the provisions of the Title VI TEU¹⁷⁸.

Wishing to derive maximum benefit from the new machinery, the Commission has quickly made use of the right of initiative. Immediately after the entry into force of the TEU, the Commission submitted a proposal on a (revised) draft *Convention on the crossing of the external frontiers of the Member States*, and a proposal for a regulation based on article 100c EC¹⁷⁹. Subsequently, the Commission adopted a *Communication on Immigration and Asylum Policies*¹⁸⁰.

¹⁷⁷ See article K.3 TEU.

¹⁷⁸ Article K.8(1) TEU, which applies certain EC Treaty provisions for the purpose of operating Title VI TEU, does not mention article 155 EC.

¹⁷⁹ See *Commission of the European Communities*, Communication from the Commission to the Council and the European Parliament, (I) Proposal for a decision, based on article K3 of the Treaty on European Union establishing the Convention on the crossing of the external frontiers of the Member States. (II) Proposal for a regulation, based on article 100c of the Treaty establishing the European Community, determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, COM (93) 684 final, 10.12.1993.

¹⁸⁰ *Commission of the European Communities (1994)*: Communication for the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM (94) 23 final, 23.02. 1994.

This communication was followed by further reports and initiatives¹⁸¹.

Notwithstanding these varied activities, it remains to be seen whether the Commission will succeed in obtaining an active part under the Third Pillar. *D'Oliveira*, for instance, believes that the real impetus and initiative may come largely from the K.4 Committee, and that in the now established intergovernmental framework with its high frequency meetings machinery, it becomes less probable that the Twelve will allow the Commission to play an important role¹⁸².

4. The role of the European Court of Justice

Title VI TEU as such is not under the jurisdiction of the European Court of Justice. As noted by *Dehousse*, "national governments have offered evidence of their aversion to «judicialization» of diplomatic processes"¹⁸³.

The Court may have power where it has expressly been given a role in conventions under article K.3(2)(c) TEU. This, for example, was proposed by the Commission with regard to the new draft External Frontiers Convention¹⁸⁴. However, several Member States, France and the United Kingdom in particular, have already indicated their opposition to such a provision¹⁸⁵. Besides, similar objections have been made with regard to other draft Conventions now being prepared within the various working groups described above¹⁸⁶.

5. The role of the European Parliament

Before Maastricht the EP was not officially involved in intergovernmental

¹⁸¹ See e.g., *Commission of the European Communities*, Proposal for a Council Regulation laying down a uniform format for visas, COM (94) 287 final, 13.07.1994.

¹⁸² *Oliveira (1994)*, pp. 263-264.

¹⁸³ *Dehousse (1994)*, p. 10.

¹⁸⁴ Article 29 of this draft Convention provides that: "The Court of Justice of the European Communities shall have jurisdiction:

- to give preliminary rulings concerning the interpretation of this Convention; references shall be made as provided in the second and third paragraphs of Article 177 of the Treaty establishing the European Community;
- in disputes concerning the implementation of this Convention, on application by a Member State or the Commission."

¹⁸⁵ See *Ameline (1994a)*, p. 26.

¹⁸⁶ See, for instance, with regard to the draft *Europol Convention* and the draft *EIS Convention*, *Agence Europe*, 20/21 June 1994 (No. 6255), p. 8.

cooperation on justice and home affairs. Article K.6 TEU now provides that:

"The Presidency and the Commission shall regularly inform the European Parliament of discussions in the areas covered by this Title.

The Presidency shall consult the European Parliament on the principal aspects of activities in the areas referred to in this Title and shall ensure that the views of the European Parliament are duly taken into consideration.

The European Parliament may ask questions of the Council or make recommendations to it. Each year, it shall hold a debate on the progress made in implementation of the areas referred to in this Title."

The terms used in article K.6 TEU are extremely vague. Moreover, at least the first and third sentence of article K.6 TEU reflect only the practice that was already well established before 1993. As described in Chapter 1, successive Presidencies kept the EP informed of progress on justice and home affairs, both by transmitting documents and through ministerial appearances at least once every six months. In addition, the Commission reported on the activities of the intergovernmental working parties and ministerial meetings. Article K.6 TEU turns these voluntary arrangements into an (indistinct) treaty requirement. Also, the EP had already asked questions, held debates and passed resolutions, making recommendations on matters which now form the basis of Title VI TEU¹⁸⁷.

The second sentence of article K.6 TEU may, theoretically, be interpreted as an advance on previous practice. The EP is given, for the first time, the right to be "consulted" on the "principal aspects of activities in areas referred to" in Title VI; furthermore, the Presidency is obliged to ensure that the parliament's views are "duly taken into consideration". However, article K.6 TEU provides for various "loopholes" to minimize such parliamentary participation. Firstly, it is by no means clear what falls under "principal aspects of activities" on which the parliament should be consulted. Does this include all the measures the Council wants to adopt on the grounds of article K.3 and K.9 TEU? Obviously, article K.6 TEU leaves the Presidency with great discretion on this behalf, and there will, in principle, be no jurisdiction of the European Court of Justice to protect the parliament's rights¹⁸⁸. Secondly, "consultation" must logically be carried out

¹⁸⁷ See on this behalf the new article 94 (Recommendations in the fields of justice and home affairs) of the Parliament's rules of procedure.

¹⁸⁸ By contrast, at Community level, where Treaties require the Council to consult the EP before an act is adopted, the opinion of the European Parliament must be sought and obtained before an act can be lawfully adopted. If, in such a case, the Council purports to adopt an act without consultation, such an omission would supply grounds for seeking the annulment of the act because an essential procedural requirement had been infringed. See e.g., ECJ, Case 138/79: *SA Roquette Frères v. EC Council* [1980] ECR 3333.

in advance. This implies the early transmission of draft texts and the willingness of Member States (and of the Commission) to give oral evidence to the EP before any decision-taking. Yet under article K.6 TEU the Presidency and the Commission are only (explicitly) obliged to inform the EP of "discussions in the areas covered by this Title". Again, there remains a large margin of discretion. The same, finally, is true for the obligation of the Presidency to "ensure that the views of the EP are duly taken into consideration". In his report on parliament's role in CJHA, *Robles Piquer*, MEP, commented this clause as follows:

"A clause such as that which instructs the presidency to ensure that the views of the European Parliament are «duly taken into consideration» is almost moving in its naivety. How is a recommendation of this kind possible, without anyone having the power to enforce it? How does something as non-binding as this get into a treaty?"¹⁸⁹

Up to now, the restrictive interpretation of article K.6 TEU has clearly prevailed. Parliament has obtained *draft texts* only in exceptional cases, and the majority of Member States has favoured simple information *ex post* rather than consultation *ex ante*¹⁹⁰. The Greek Presidency, for instance, has declined the invitation of the Committee on Civil Liberties and Internal Affairs to inform the Committee *prior* to the meeting of the Justice and Home Affairs Council of 23 March 1994 in Brussels of the issues to be treated during the meeting.

However, the EP finds itself in a better position when proposals are put forward by the Commission. For instance, the above-mentioned Commission's proposal for an External Frontiers Convention, together with the proposal for an EC regulation on visa policy, was published as a *Communication from the Commission to the Council and the European Parliament*¹⁹¹. Both proposals were submitted to the EP by the Commission on 10 December 1993. Three months later, the same communication was forwarded to the EP by the Council; but the Committee on Civil Liberties and Internal Affairs had started to consider the draft Convention well before being officially consulted by the Council. After four meetings, the Committee, on 29 March 1994, adopted a report and a motion for a resolution¹⁹². Subsequently, the report and the motion were debated

¹⁸⁹ *Robles Piquer*, p. 17.

¹⁹⁰ See *Agence Europe*, 9 September 1994 (N° 6311), p. 8, and 20/21 June 1994 (N° 6255), p. 8.

¹⁹¹ COM (93) 684 final, 10 December 1993.

¹⁹² *Committee on Civil Liberties and Internal Affairs*, Report on the Communication of the Commission containing a proposal for a decision, based on article K3 of the Treaty on European Union establishing the Convention on the crossing of the external frontiers of the Member States, Rapporteur: *Christopher Beazley*, A3-190/94 (F'E 208.169/final).

in parliament on 21 April 1994. Parliament approved the Commission's proposal subject to a number of substantial amendments¹⁹³.

The Commission finds itself in a delicate position when communicating with the EP on justice and home affairs. According to the second sentence of article K.6 TEU, the consultation of the EP falls under the (sole) responsibility of the Presidency. If proposals do not stem from the Commission, the latter may be especially reluctant to give the EP information Member States probably want to maintain confidential. If the Commission does not respect this choice, it may soon find itself outside the decision-making process.

To sum up, the establishment of the Third Pillar has not changed the EP's legal status significantly with regard to cooperation on justice and home affairs. Access to documents has remained restricted, the chances of participation are limited and strongly dependent on the goodwill of the Member States¹⁹⁴. In any event, the parliament's views and recommendations have no binding force, and the Member States' failure to respect article K.6 TEU by no means affects the validity of acts adopted under Title VI TEU¹⁹⁵.

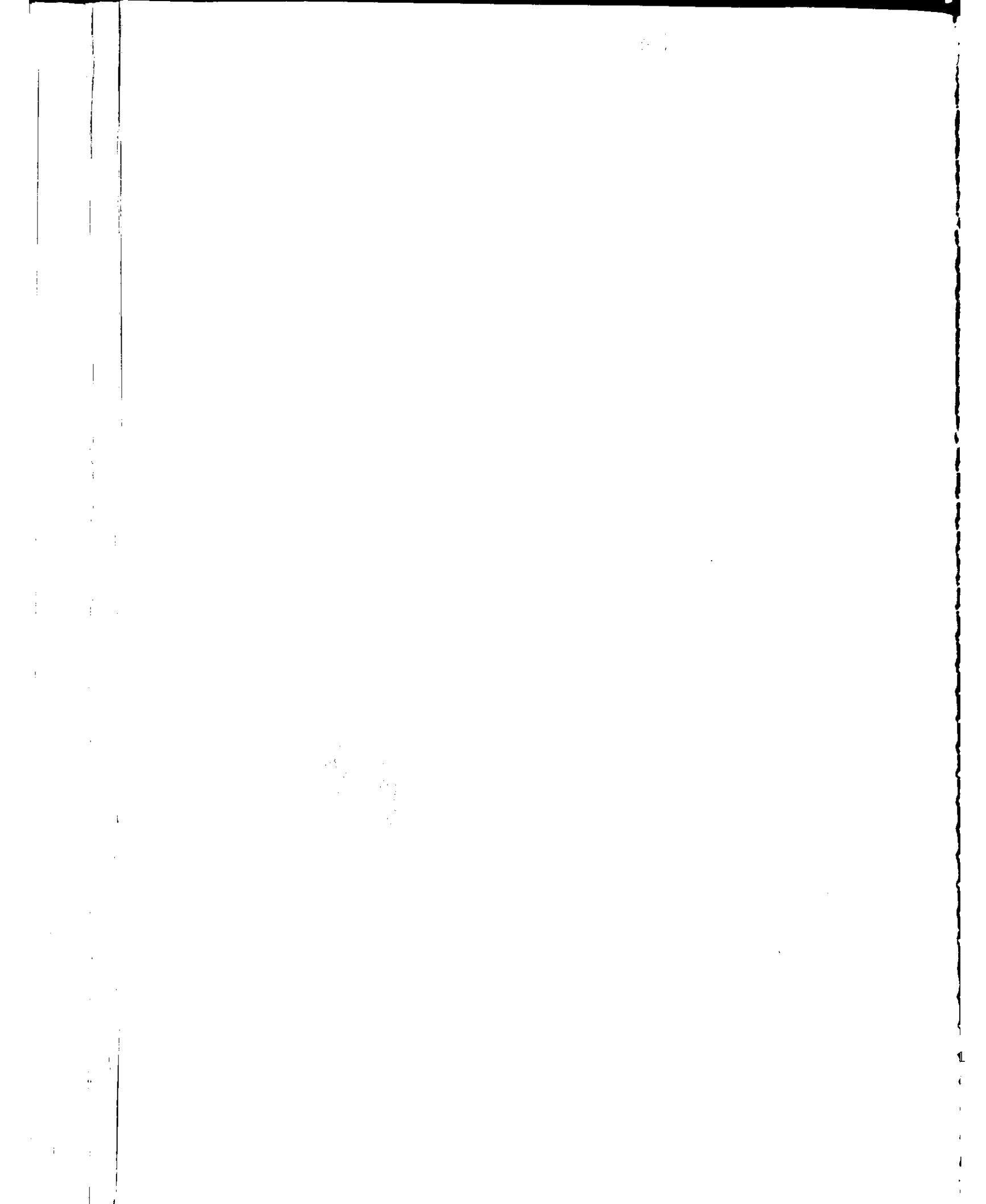
Parliament has therefore called on the Council and the Commission to enter into negotiations with it regarding the conclusion of an *interinstitutional agreement* on the application of article K.6 TEU. A draft for such an agreement was forwarded to the Council and the Commission in December 1993¹⁹⁶. This draft agreement contains very detailed and far reaching provisions on parliamentary information, participation and accountability under the Third Pillar. It is divided into three sections. The first section regards the *information* ("access

¹⁹³ See OJ No. C 128 of 9.5.1994, p. 358.

¹⁹⁴ Mention should also be made of the new article 93 (Consultation of and provision of information to Parliament in the fields of justice and home affairs) of the European Parliament's rules of procedure. In this article the Committee on Civil Liberties and Internal Affairs is given responsibility to ensure that parliament is fully informed and consulted on the activities covered by CJHA. Article 93 (3) stipulates that the "Council and Commission shall provide the committee responsible with full, regular and timely information on the development of cooperation in the fields of justice and home affairs". Of course, this provision cannot bind the Council or Commission. So far, it has remained meaningless.

¹⁹⁵ The process of consultation on the grounds of article K.6 TEU should, therefore, not be confused with the consultation procedure on proposals for Community legislation required by several EC Treaty articles.

¹⁹⁶ *Interinstitutional Conference - European Parliament Delegation (The Secretariat)*, Draft interinstitutional agreement between the European Parliament, the Council and the Commission on the procedures for implementing Title VI of the Treaty on European Union, Brussels, 1 December 1993, PE 207.086/rev.



to documents" etc.) which has to be made available to the EP:

- "1. The Council and Commission shall keep the European Parliament informed at all times of the progress of work in the fields of justice and home affairs.
2. Halfway through, and at the end of, its term, the Council shall submit to the European Parliament a biannual report on work in hand and progress achieved in this field. Parliament shall hold a debate on this report in presence of the President of the Council on the basis of a report by its competent committee.
3. There shall be a biannual colloquy between the President of the Council and the competent committee of the European Parliament on cooperation in the fields of justice and home affairs. The European Parliament's competent committee may request the President of the Council to appear before it for the purpose of information.
4. The Council shall be represented at the appropriate possible level at the meetings of the competent body of Parliament and shall accept the introduction of question time in committee.
5. The institutions shall set up a joint information network for the transmission of documents, including working documents on the COREU model. Members of Parliament directly concerned may not be refused access to such documents on the grounds of confidentiality.
6. The Council and the Commission shall supply the competent body of Parliament, without delay, with all the data on which the decision to adopt a joint action or position is based.
7. The Commission shall regularly inform the competent body of Parliament of the content of the proposals with its intends to submit to the Council. This information shall also cover the activities of the external delegations in third countries or to international organizations."

Section two of the draft agreement regards the consultation ("participation") of the EP:

- "1. The Council shall formally consult the European Parliament in advance, and in accordance with the appropriate procedures, on proposed joint positions, joint action and conventions as specified in Article K.3(2). Parliament undertakes to deliver its opinion within a period agreed with the Council.
2. Parliament shall be immediately informed of any initiative by a Member State or the Commission with a view to the conclusion of a new international agreement. It shall be involved in the deliberations and in any decision to invoke Article 100c of the Treaty establishing the European Community in conjunction with Article K.9 of the Treaty on European Union.
3. Parliament shall be fully involved in the substance of deliberations between the Member States and the Commission on the content of the agreement; for this purpose, close cooperation shall be established between the Coordinating Committee referred to in Article K.4 of the Treaty on European Union and Parliament's competent committee.
4. Parliament or, where appropriate, its competent committee, shall be regularly informed of the progress of implementation of the agreement and shall be involved in any amendment thereof; the principles defined above shall extend to conventions implementing agreements and agreements requiring to be concluded with third countries.
5. The President of the Council may invite the representative of the European Parliament to attend a Council meeting in order to elucidate orally the opinions delivered by Parliament."

Section three, finally, regards the significance of parliamentary recommendations ("accountability") on matters of justice and home affairs

- "1. The President of the Council shall include on the agenda of each Council meeting Parliament's questions and recommendations pursuant to Article K.6, third paragraph, of the Treaty on European Union.
2. The Council and Commission shall inform Parliament as soon as possible of the action taken on its recommendations and shall, in each case, specify the measures undertaken. Where the Council has failed to take action on Parliament's opinion, it shall inform Parliament of its reasons."

Quite obviously, these proposals go far beyond the intentions of the Maastricht Contracting Parties and of the content of article K.6 TEU. Parliament, *inter alia*, wants to have access to practically all the documents produced under the Third Pillar, confidential documents and working documents included. It wants to be consulted on the drafts of all joint positions, joint actions or conventions as well as of draft measures implementing any of these acts before they are adopted by the Council in accordance with article K.3(2) TEU. Parliament even wants to participate in deliberations in the Council on the contents of such measures.

The Council's response to these claims has been disapproving, and Monar suggests that the *excessive character* of parliament's proposals may be one of the reasons why, in February 1994, the Council informed the EP that it did not wish to enter into negotiations on the draft interinstitutional agreement on CJHA at all¹⁹⁷.

C. Summary of Chapter 2

Title VI TEU places intergovernmental cooperation on justice and home affairs among the Twelve within a *legal and institutional framework*. However ambiguous it may seem, it is demonstrably less ramshackle and disorganised than before.

The *institutional structure*, however, remains rather complex. Firstly, cooperation under Title VI TEU will take place at five different levels: in the Council, in COREPER, in the K.4 Committee, in three steering groups, and in numerous permanent/*ad hoc* working groups. The distribution of powers between COREPER and the K.4 Committee, in particular, is far from clear¹⁹⁸. By contrast, in the European Community COREPER is directly connected to the working groups. Yet such a comparison might be misleading for in the Community most of the preparatory work is undertaken by the Commission. Secondly and more importantly, Title VI TEU does not merge all existing forms of cooperation into one coherent framework. On the one hand, intergovernmental cooperation on justice and home affairs among (some) Member States will continue to evolve outside the European Union, for instance within the *Schen-*

¹⁹⁷ See Monar, p. 716.

¹⁹⁸ Similar problems exist under the Second Pillar (CFSF). Article J.8(5) TEU provides for the establishment of a *Political Committee* consisting of Political Directors which, without prejudice to the competences of COREPER, is supposed to fulfill functions, comparable to the ones entrusted to the K.4 Committee.

gen Group. On the other hand, some aspects of justice and home affairs will be dealt with at *Community level*. Obviously, this rather puzzling distribution of powers between the EU, the EC and the Member States, with different legal instruments and procedures creates additional complications. Visa policy, for instance, will be dealt with partly at Community level (EC-regulations)¹⁹⁹, partly on the grounds of article K.1(2) and (3a) TEU (joint actions, conventions, implementing measures), partly within the Schengen Group (implementing measures)²⁰⁰ and finally at national level²⁰¹. It may therefore be concluded with *Weiler* that "the variety of decision-making procedures within the Community are complex and obstruct the transparency of governance. But the Three Pillar structure adds to this complexity without ... really achieving the goal of separateness"²⁰².

Although the involvement of the Commission and (marginally) the EP holds out the prospect of greater openness and wider debate, *decision-making procedures* remain opaque and closer to those of classical diplomacy. Discussions and debate will be concentrated in *closed meetings* of ministers and their officials. Also, the rotating presidency of the Council, which holds a major responsibility in managing business, is not easily accessible, in particular not to parliamentarians from other Member States. Nonetheless, in contrast to previous arrangements, the Council of Interior and Justice Ministers will now act under its ordinary rules of procedures, and this bears several advantages with regard to the transparency of the decision-making process. Eventually, work within the Council will be more formalized and predictable²⁰³. Secondly, article 7(5) of the revised Council's Rules of Procedure provides for the publication of votes (unless the Council decides otherwise by simple majority)²⁰⁴. Therefore, where the Council will adopt measures under Title VI by majority vote²⁰⁵, theoretically, the results of such votes will have to be published. In addition, according to the revised article 6 of its Rules of Procedure, the Council may

¹⁹⁹ Article 100c EC, and Commission's proposal for a regulation determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, COM (93) 684 final, 10.12.1993, pp. 40-48.

²⁰⁰ See articles 9-18 Schengen II.

²⁰¹ Visas for long visits, e.g., will remain a matter of national competence.

²⁰² *Weiler (1993)*, p. 51.

²⁰³ See e.g., article 2 [agenda-setting] Council's Rules of Procedure.

²⁰⁴ See OJ No. L 304 of 10.12.1993, p. 1.

²⁰⁵ See article K.3(2)(b) and (c) TEU.

decide to hold meetings in public. However, it would be unrealistic to expect such public Council meetings under the Third Pillar in the near future.

Limited access to draft and final texts remains one of the most troublesome facts under the Third Pillar. Indeed, in contrast to Community legislation there is no automatic publicity for proposals. Furthermore, Title VI TEU does not provide for the publication of all measures adopted under article K.3 TEU²⁰⁶. The Council's *work programme for 1994* and the *action plan*, for instance, which are of undoubted importance, have not been officially published by the European Union²⁰⁷. Moreover, just as before the introduction of Title VI TEU, the *legal status of documents* will remain unclear since article K.3 TEU is rather ambiguous on this regard. Acts under preparation will often be considered as legally non-binding, and this may serve Member States as a (convenient) shield to keep things outside public or parliamentary scrutiny²⁰⁸.

However, as shown above, under Title VI TEU, the Commission now shares a right of initiative with the Member States, and in contrast to the latter, it has not hesitated to publish proposals. The Commission's proposal for a draft External Frontiers Convention, for example, was published as an official COM-Document the day it was submitted to the Council. It may be recalled that the previous draft on the External Frontiers Convention, on which the *Ad hoc Group on Immigration* had almost finished its work by 1991, has never been submitted to public scrutiny²⁰⁹. Similarly, the Dublin Asylum Convention was only published after its signature by eleven Member States on 15 June 1990.

Title VI TEU does not explicitly provide for the general publication of proposals put forward and acts adopted under the Third Pillar. The EP's rights with regard to information, participation and accountability have remained strictly limited. All this, however, does not mean that the establishment of the Third Pillar has not had a positive impact with regard to openness and parliamentary involvement in CJHA at the national level. As will be shown for the United Kingdom, France and Germany in Chapter 3, the introduction of the Title VI TEU has led in these (and other) EU Member States to the establish-

²⁰⁶ Pursuant to article 15(3) of the Council's Rules of Procedure, the Council may decide unanimously to publish directives, decisions and recommendations in the *Official Journal*. This provision may also apply to acts adopted under Title VI TEU.

²⁰⁷ Summaries of these documents have been published in Bull.EC 11-1993, point 1.5.1., and Bull.EC 12-1993, point 1.8.

²⁰⁸ See above in Chapter 2.B, pp. 42-43, with regard to the legal nature of acts adopted under Title VI TEU, and below Chapter 3.

²⁰⁹ See above Chapter 1.D, p. 16, footnote 52.

ment of special parliamentary procedures which will allow for more systematic information and chances of parliamentary participation. The silence of Title VI TEU on such questions may, therefore, also be interpreted as an attempt to keep the *EP* outside the decision-making process.

Chapter 3. National Parliaments and Cooperation in the Fields of Justice and Home Affairs after Maastricht

In this chapter it will be argued that even though the integration of matters of justice and home affairs into the framework of the European Union has not changed the *intergovernmental character* of cooperation substantially, it has led national parliaments to commit their own governments to more openness and to accept a deeper parliamentary involvement in these matters at national level. Taking the British, French and German examples it will be shown that in these Member States cooperation in the fields of justice and home affairs is no longer legally defined as (traditional) *foreign affairs* which should come under the "domaine réservé" of the executive. Instead, these matters are now treated like or similar to *European Community affairs*, for which all Member States' parliaments have established *special scrutiny procedures*²¹⁰.

A. United Kingdom

1. The role of Parliament in *foreign affairs* and in *Community affairs*

As a general principle, the conduct of *foreign policy* under the United Kingdom constitution is within the prerogative of the Crown. This means that decisions on such matters of foreign policy as the recognition of foreign states or the conduct of diplomatic relations are taken by the government. Ministers are responsible to parliament in a broad sense for their conduct of foreign policy²¹¹. Their actions may be examined or criticised through oral or written questions or by debate in either House of Parliament. In addition, the House of Commons *Foreign Affairs Committee* of the House of Commons examines "the expenditure,

²¹⁰ For a survey on the EC-scrutiny procedures in all EU Member States see *Pandraud (1994a)*, pp. 269-320.

²¹¹ On parliament's role in foreign affairs see *Brownlie*, pp. 4-9; *Wade/Bradley*, pp. 324-334, esp. 325 and 331-332; *Select Committee on the European Communities, House of Lords, Political Union: Law-Making Powers and Procedures*, 17th Report, HL (1990-91) 80, Appendix 4 [The Role of Parliament in the United Kingdom in Regard to the Conclusion of Treaties].

administration and policy of the Foreign and Commonwealth Office and of associated public bodies"²¹². Other so-called *departmentally related Select Committees*, for example the *Home Affairs Committee*, may conduct inquiries and report on "foreign affairs" insofar as they are related to their fields of competence²¹³.

Ministers do not, however, require prior authority from parliament for any action which can be carried out within the existing law of the United Kingdom. There is, in particular, no direct parliamentary involvement in the making of treaties, which is a wholly executive act. Parliament does not need to be consulted before or during negotiations on a treaty or before a text is initialled. Draft treaties and other negotiating documents are not disclosed unless the originator of such documents has released them.

To this, two qualifications must be made. Firstly, treaties as such do not form part of United Kingdom law. Where they impose commitments at variance with internal law, effect must be given to them by or under statute. For this reason, treaties requiring changes in law are given effect by legislation in parliament before they are ratified or otherwise brought into force for the United Kingdom. Yet often a minister may be able to make the required changes in national law by exercising powers of delegated legislation. Secondly, under the so-called *Ponsonby Rule*²¹⁴, the government is obliged to lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty will be ratified. This both informs parliament of the treaty and enables it to be debated²¹⁵. The Ponsonby Rule applies when the text of a treaty has been authenticated by signature or by adoption in a Final Act/Resolution of a Conference or international organisation, but not when a text has only been initialled. It only applies when the consent of the United

²¹² See St. Orders HC No. 130.

²¹³ With regard to the functions and powers of Select Committees see *Gavin Drewry (ed.)*, *The New Select Committees*, 2nd ed., Oxford 1989. I should add that there are no such departmentally related Select Committees in the House of Lords.

²¹⁴ The Rule was so called after an undertaking given to the House of Commons in 1924 by the then Parliamentary Under-Secretary of State in the Foreign Office, Mr Ponsonby (later Lord Ponsonby).

²¹⁵ As a general rule, when a treaty or international agreement in any form is signed on behalf of the United Kingdom with a foreign State or States or with an international organisation it is presented to parliament. Constitutionally, it is so presented by command of the Queen and therefore becomes a *Command Paper*. In practice the responsibility for presentation lies with the Minister in charge of the relevant Government Department. Command Papers are printed following their presentation to parliament and are included in a numbered series. When a treaty has been presented in this way its text becomes public domain and questions may be asked to the Minister responsible about its content.

Kingdom to be bound by the instrument is subject to a further formal act such as the exchange or deposit of an instrument of ratification²¹⁶. If a treaty does not come under the Ponsonby Rule but needs legislation before it can be brought into force in the United Kingdom, it has now become common to lay a text before parliament before the legislation is debated.

On the whole, the parliament rather plays a secondary role in foreign affairs. Usually it becomes involved only after the final decision-taking at international level. Early information or consultation are exceptional procedures. Parliamentary sanctions exist in theory, but in practice parliament has never refused to authorise the ratification of a treaty laid before it.

By contrast, special procedures have been established under which parliament is consulted on *draft Community legislation before decisions are taken in Brussels*. The United Kingdom system of parliamentary scrutiny of Community legislation is quite sophisticated; it cannot be described here in full detail²¹⁷. In short, the EC-scrutiny rests on three pillars: extensive and early information; establishment of special EC-Committees; "parliamentary reserve".

Firstly, effective scrutiny implies the early provision of all relevant documents. Accordingly, government supplies parliament with the following "EC-Documents":

- "(i) any proposal under the Community Treaties for legislation by the Council of Ministers;
- (ii) any document which is published for submission to the European Council or the Council of Ministers;
- (iii) any document (not falling within (ii) above) which is published by one Community institution for or with a view to submission to another Community institution and which does not relate exclusively to consideration of any proposal for legislation;
- (iv) any other document relating to European Community matters deposited in the House by a Minister of the Crown."²¹⁸

The government has undertaken to supply parliament with such EC-Documents within forty-eight hours of their receipt by the Cabinet Office (European Secretariat); it also agreed to supply both Houses with *explanatory memoranda* on the documents within two weeks²¹⁹.

Secondly, in both Houses up to one thousand EC-Documents are examined

²¹⁶ A rough estimate is that about one in four of treaties entered into by the United Kingdom are subject to the Ponsonby Rule.

²¹⁷ See *Bates; Denza; Weber-Panariello*, §§ 4-5.

²¹⁸ See St. Order HC No. 127(1).

²¹⁹ *Explanatory memoranda* always contain the following information: subject matter; ministerial responsibility; legal and procedural issues; subsidiarity; government's view on policy and financial implications; timetable.

by special *EC Select Committees* every year²²⁰. These scrutiny committees, *inter alia*, report on the legal and political importance of such documents²²¹. If a document is of sufficient importance, the committees may recommend it for debate, either on the Floor or in special *European Standing Committees*²²². After such a debate either House may vote a Resolution. Such resolutions, however, do not bind the government legally. Less important documents are cleared by the committees immediately and the scrutiny process is completed.

Thirdly, when Britain acceded to the EC in 1972, the government undertook not to agree to any proposal in the Council of Ministers until parliamentary scrutiny was complete. The government's undertaking was subsequently embodied in a resolution of the House of Commons of 30 October 1980²²³. A Minister may, however, decide "for special reasons" to give agreement in the Council of Ministers to a proposal still subject to scrutiny. The Minister must explain his reasons to the Select Committee or to the House. The principle of "*parliamentary reserve*" is applied in the same way in the House of Lords.

Thus, in the United Kingdom parliamentary participation in Community affairs and in foreign affairs differs quite significantly. Parliament is kept informed about EC legislative proposals and other important documents syste-

²²⁰ In the House of Commons a *Select Committee on European Legislation* is appointed under St. Order HC No. 127. In the House of Lords a *Select Committee on the European Communities* is appointed each session by a special motion. See e.g., HL Deb, 23 November 1993, Col. 140. Both Committees, *inter alia*, possess all the powers normally granted to Select Committees, including: power to send for persons, papers and records; power to adjourn from place to place; power to appoint sub-committees; power to appoint specialist advisers.

²²¹ Both committees may conduct special inquiries. However, the methods of scrutiny in the House of Commons and the House of Lords differ widely. The function of the House of Commons EC Select Committee is confined to determining which proposals are legally or politically important and to advising which of these should be debated by the House. Only recently the Committee has started to advise on the merits of a proposal, or to consult outside expert opinion or vested interests on its substance. By contrast, the House of Lords EC Select Committee has much more focussed on in-depth enquiries and reports on Community proposals or other documents. See *Weber-Panariello*, §§ 4 and 5.

²²² European Standing Committees only exist in the House of Commons. See St. Order HC No. 102. *Standing Committees* should not be confused with *Select Committees*. Standing Committees are pure "debating committees". They use the same debating procedures as the House, and indeed are much like the House in miniature. They meet in public; they have neutral chairmen, and they examine bills and other matters such as EC Documents, in much the same way as the House does. Usually Standing Committees are *ad hoc* committees. The two European Standing Committees in the House of Commons, however, which consist of 13 Members each, are permanent committees. See *Weber-Panariello*, § 4.II.

²²³ This Resolution has been revised by a second Resolution, voted by the House of Commons on 24 October 1990, in order to take into account the institutional changes of the Single European Act [introduction of the cooperation procedure pursuant to article 149 EEC]. The Resolution is printed in every report of the House of Commons Select Committee on European Legislation. See e.g., *Select Committee on European Legislation*, Scrutiny after Maastricht, First Special Report, HC (1993-94) 99, p. iii.

matically and at an early stage. The government will give its consent in the Council only after parliament has been given the possibility to scrutinize and debate such a proposal. Some scholars therefore even consider that influence can be brought to bear at a much earlier stage in the formulation of EC-legislation than is true for domestic law (or international treaties), where parliament is often the last to be consulted. *Brew*, for instance, concludes: "It may be ... that while the formal power of Parliament has been eroded, its real influence has actually been enhanced."²²⁴ And the British Secretary of State for Foreign Affairs, *Douglas Hurd*, recently expressed the following opinion: "I feel that the way in which this Parliament controls and deals with European decision-making, to put it mildly, is at least as brisk and thorough as that which it does with domestic."²²⁵

2. Parliament and CJHA

Title VI TEU does not provide for "Community legislation", and proposals will not be "Community" proposals. Accordingly, the above described special EC-scrutiny procedures do not automatically apply to the Third Pillar.

The question of parliamentary scrutiny of the intergovernmental pillars was, therefore, addressed during 1993 in both Houses on several occasions²²⁶. The House of Lords' Select Committee on the European Communities, in particular, set up a full inquiry on this matter. In its final report, the Committee noted that:

"By comparison with Community legislative procedures, the Commission will have a smaller role, there will be no automatic publicity for proposals and governments will tend to prefer for their negotiations the secret ways to which they are accustomed. This lays a greater responsibility on national parliaments each to hold their own ministers to account. The European Parliament's formal powers under the Maastricht Treaty are limited in regard to ... justice and home affairs, and the Parliament is less able to influence the outcome of inter-governmental negotiations through the Commission whose role is also limited. As with Community legislation, the work of the European Parliament and the work of national parliaments are complementary, but we see national parliaments as having the stronger potential in regard to the inter-governmental pillars."²²⁷

The Committee continued:

"The key to effective supervision is to obtain the right documents, and to obtain them in time to

²²⁴ *Brew*, p. 246.

²²⁵ *Douglas Hurd*, in: *Foreign Affairs Committee, House of Commons, Europe after Maastricht*, Second Report, HC (1992-1993) 642-I, p. xxv [emphasis added].

²²⁶ See *Home Affairs Committee, HL (1993)*, and *Foreign Affairs Committee*, above footnote 223.

²²⁷ *Select Committee on the European Communities, HL (1993)*, p. 22 (para. 48).

influence the outcome. Acquiring documents which are subject to inter-governmental negotiation is much more difficult than acquiring draft Community legislation, where almost all measures begin with a formal proposal from the Commission which is in the public domain. ... In order to exercise influence over the substance of international agreements and decisions it is essential to see texts in draft. Once a text is finalised at the international level the only choice available in practice to national parliaments is between acceptance, outright rejection or a demand for re-negotiation. ... We seek to make a more constructive input".²²⁸

To this end, the Committee proposed that the government should in principle provide parliament with any document qualifying under one of the following three tests:

- significance (particularly where the rights or duties of individuals may be affected);
- eventual need for United Kingdom primary or secondary legislation;
- imposition of legally binding commitments on the United Kingdom²²⁹.

These documents should be deposited in parliament within forty-eight hours, and followed after the normal period by an explanatory memorandum. In the Committee's opinion, the need for a speedy decision should not restrict disclosure. Also, Ministers should be reluctant to displace the presumption of public availability of a negotiating document, and they should be prepared to explain the need for secrecy to parliament when the matter does become public knowledge.

Furthermore, the Committee proposed that parliamentary supervision of the Third Pillar should proceed as for the supervision of EC legislation^{230,231}. Particularly, the objective should be to install a system under which the government undertakes wherever possible, not to agree to a proposal in the Council until parliamentary scrutiny has been completed²³².

²²⁸ *Select Committee on the European Communities, HL (1993), p. 22 (para. 50).*

²²⁹ *See Select Committee on the European Communities, HL (1993), p. 23 (para. 53).*

²³⁰ In the Committee's opinion parliament can best contribute to the effective formation of policy in justice and home affairs by extending its mainly public procedures: "This method permits our own views to be strengthened by the reception of independent evidence and permits open questioning of the government's position and the reasons for it ... We would not wish to exclude altogether the opportunity for confidential briefings, but we recognise that the disadvantage of these is our inability to refer to this information either in reporting to the House or in public debate." *Select Committee on the European Communities, HL (1993), p. 24 (para. 57).*

²³¹ Besides, in recent years the House of Lords EC Select Committee has already carried out several enquiries in the areas within the Third Pillar. These include, *inter alia*, the Report on *Passport Union* (10th Report, HL (1979-80) 58), *Community Policy and Migration* (10th Report, HL (1992-93) 35), and *Select Committee on the European Communities, HL (1989)*. In all these areas there was some claim to Community competence and for that reason some proposal or communication from the Commission, deposited by the government pursuant to their undertakings relating to EC scrutiny, which formed the starting point for the enquiry.

²³² *See Select Committee on the European Communities, HL (1993), p. 24 (para. 62).*

The government's response to these proposals and similar proposals put forward by the House of Commons' Foreign Affairs Committee and the Home Affairs Committee was ambiguous²³³. On the one hand, the government agreed that accountability for work under the intergovernmental pillars should be to national parliaments, and that the key to effective parliamentary supervision was to make available the right documents in time to influence the outcome. It therefore considered that parliament should receive in relation to Title VI:

- the first full text that is tabled of any Convention or proposals which will, if agreed, require later primary legislation in the United Kingdom, except where the proposal relates to security arrangements or operational matters and publication could prejudice the effectiveness of the intended action;
- substantial changes which subsequently occur during the negotiation of the final text;
- other documents going to the Council of Interior and Justice Ministers which are of significant importance²³⁴.

If the government concluded that a document regarding the Third Pillar fell under the agreed criteria for submission to parliament, it would be the government's intention to deposit it "quickly" and to supply an explanatory memorandum within ten working days of its deposit. Also, government welcomed the House of Lords' EC Select Committee's conclusion that parliament should focus and give independent views on government policy in this area through hearings and briefings. Ministers would, therefore, be ready to offer briefings on matters of particular interest to the Committee. Such meetings should be held mainly in public. For certain business, however, confidential sessions might be more appropriate²³⁵.

Thus, the government committed itself to quite extensive and early information. On the other hand, it was not persuaded that a *formal scrutiny reserve* was appropriate for cooperation carried out under the Third Pillar. Michael

²³³ See *House of Lords Scrutiny of the Inter-Governmental Pillars of the European Union - Observations by the Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Home Affairs*, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, February 1994, Cm 2471 (hereinafter: *Government's Response*).

²³⁴ See *Government's Response*, p. 4, and *Memorandum by the Home Office*, Intergovernmental Cooperation in the Fields of Justice and Home Affairs, in: *Select Committee on the European Communities, HL (1993)*, Evidence, p. 5. In its response the government anticipated that documents of a *legally binding nature* would fall under the heading of *other documents of significant importance* and could "accept an explicit commitment to provide them, subject to the requirements of security and confidentiality". Furthermore, the government agreed that secrecy may restrict disclosure under the Third Pillar but would take "reasonable steps to ensure that this exception is only used where absolutely necessary". *Government's Response*, p. 4.

²³⁵ See *Government's Response*, pp. 4-5.

Howard, Home Secretary, defended this view before the House of Lords' EC Select Committee as follows:

[There will be no formal power of scrutiny reserve which the Committee would have to lift] but the reason for that is this: the scrutiny reserve has been exercised up to now in the context of proposals for legislation, for Community legislation, which is of course binding upon this country. That is in a particular category where I think the machinery of scrutiny reserve is directly relevant. We are not here talking about Community legislation and I therefore do not think that that precise procedure is appropriate. We are seeking to reproduce in general terms the opportunities for scrutiny which this and other committees will have, but the procedures will not be identical because the decision making processes are not identical.²³⁶

Consequently, except for the "traditional" constitutional tools (Ponsonby Rule) which continue to apply to CJHA, there will be no special scrutiny requirements which could prevent the United Kingdom's agreement to a proposal in the Council. Accordingly, there will be less incentive for the government to provide parliament with early information since it is not bound to await the completion of parliamentary scrutiny before it may act. By contrast, in the scrutiny of EC legislation, the principle of *parliamentary reserve* has served parliament as a useful weapon to push through early and complete information.

Nonetheless, under these new arrangements parliament finds itself in a position which is clearly better than that prior to Maastricht. The institutional and legal framework under Title VI TEU has enabled CJHA to become more efficiently structured and transparent and therefore easier to follow. Most importantly, the government now earlier and systematically provides both Houses with more information²³⁷. Significantly, only in exceptional cases will this information be subject to confidentiality.

²³⁶ *Select Committee on the European Communities, HL, (1993), Evidence p. 11. See also Government's Response, p. 5.*

²³⁷ On the request of the Home Affairs Committee the Home Office produced a list of those documents discussed at the Justice and Home Affairs Council Meeting of 29/30 November 1993 which would have been depositable under the new criteria described above. This list, *inter alia*, included the Council's action plan and work programme for 1994; the report on the activities of CIREA; Progress reports on EUROPOL (the establishment of EDU; progress in drafting the Convention); the interim progress report regarding extradition; the Council's resolution on the protection of the Community's financial interest. Since, all those documents have been made available to both Houses. See *Home Affairs Committee, HC (1993), pp. 45-46.*

B. France

1. The role of Parliament in *foreign affairs* and *Community affairs*

The powerful position of French parliament under the Third and Fourth Republics led to permanent governmental crises, and to the bad reputation of the parliamentary government in France. Consequently, under the Fifth Republic the previous "*parlementarisme exacerbé*" was replaced by the "*parlementarisme rationalisé*". Parliament's legislative powers and those to control the Executive were rigorously reduced²³⁸. The conducting of foreign affairs was almost entirely entrusted to the Executive, i.e. to the government on the one side and to the President on the other²³⁹.

As in the United Kingdom, there is no parliamentary involvement in the making of treaties, and Parliament does not need to be consulted before or during negotiations on a treaty. The *Foreign Affairs Committees*, which theoretically could communicate with the government, play a very marginal role and have been described by Cot as "friendly clubs which meet once a week to talk of this and that"²⁴⁰. The possibilities for Parliament to criticise the government have been considerably reduced since the *Conseil Constitutionnel*, in a decision of 1959 held that Parliament should not vote resolutions "qui tendraient à orienter ou à contrôler l'action gouvernementale"²⁴¹. In other words: governmental actions may be examined or criticised through oral or written questions, but if parliament wants to influence, before final decision-taking, a certain governmental action in foreign policy by putting it to vote the only possibility is a vote of censure²⁴². A further restriction of parliament's powers is evident in the fact that only the government is responsible to parliament. The directly elected President who plays an important role in foreign policy is not accountable to parliament at all. Zoller therefore concludes:

"Depuis 1958, il est clair qu'en matière extérieure, les assemblées n'ont aucune initiative, ni aucun pouvoir d'orientation. Sur le plan juridique, la raison essentielle en est que la politique

²³⁸ On this regard see e.g., John Frears, *the French Parliament: Loyal Workhorse, Poor Watchdog*, in: *West European Politics*, Vol. 13/3, pp. 32-43.

²³⁹ See esp. articles 20 and 52 Cf.

²⁴⁰ Cot, p. 13.

²⁴¹ Décision n° 59-2 DC, 17, 18 et 24 juin 1959. See also Zoller, 37f.

²⁴² See article 49(2) Cf.

étrangère n'est plus seulement l'affaire de l'exécutif, comme c'était déjà le cas sous les Républiques antérieures et comme c'est d'ailleurs le cas dans tous les régimes politiques; la politique étrangère est aujourd'hui l'affaire *exclusive* de l'exécutif dans la mesure où, d'une part, le parlement ne peut plus comme autrefois se saisir de n'importe quelle question et, d'autre part, il existe non seulement des dispositions (notamment, art. 20 et 52 de la Constitution), mais aussi un organe (le conseil constitutionnel) pour l'empêcher de sortir du rôle bien défini que le constituant lui a assigné.²⁴³

In practice, parliament becomes involved only after a treaty has been initialled or signed. Pursuant to article 53 Cf., *inter alia*, treaties of peace, trade agreements, treaties relating to international organization, those involving a financial burden for the state, and treaties modifying laws²⁴⁴ can only be approved or ratified by virtue of a law²⁴⁵. Interestingly, article 53 Cf. stipulates the intervention of parliament not only before ratification but also before approval. Thus, parliamentary intervention is not justified by a formal criterion (the existence of a treaty *needing ratification* in order to enter into force), but by a material one (the subject-matter of the however legally binding agreement). Nonetheless, article 53 Cf. gives parliament only limited power. Firstly, the government can make such a law of approval an issue of confidence and the constitution makes it very difficult for the parliament to defeat government²⁴⁶. Secondly, parliamentary approval can be bypassed if the president decides to hold a referendum on the respective law to approve a treaty²⁴⁷. Thirdly, according to *Cot*, parliamentary control "is severely limited in practice, sometimes by an unbelievable disorder in the selection process by which treaties are submitted to parliament and by a too strict interpretation" of article 53 Cf. itself²⁴⁸.

Until 1979, parliamentary participation in *European Community affairs* was practically non-existent²⁴⁹. After the first direct elections to the EP, the French Parliament adopted a law on the establishment of special parliamentary

²⁴³ Zoller, 37.

²⁴⁴ Article 34 Cf. contains a list of matters which have to be dealt with by (parliamentary) laws ("loi"). Pursuant to article 37 Cf. all matters which don't (explicitly) have to be dealt with by law may be dealt with by (governmental) regulations ("règlement").

²⁴⁵ Article 53 Cf.: "Les traités de paix, les traités de commerce, les traités ou accords relatifs à l'organisation internationale, ceux qui engagent les finances de l'Etat, ceux qui modifient des dispositions de nature législative, ceux qui sont relatifs à l'état des personnes, ceux qui comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés ou approuvés qu'en vertu d'une loi."

²⁴⁶ See article 49(3) Cf.

²⁴⁷ See article 11 Cf., and Zoller, p. 321.

²⁴⁸ See *Cot*, pp. 16-20.

²⁴⁹ On the following see Weber-Panariello, §§ 10-11.

"EC Delegations"²⁵⁰. This law was revised in 1990²⁵¹. The government was obliged to provide the delegations with proposals for directives and regulations and other "necessary" documents produced by the *European Community* institutions. Furthermore, the government had to inform the delegations on the course of negotiations at Community level. To this end, the EC Delegations were given the power to receive evidence from ministers and from other persons and institutions such as the EC Commission²⁵². As a result, the EC Delegations became increasingly well-informed about EC matters and steadily improved the number and quality of their (public) reports. However, these reports could not be especially debated in parliament. In particular, as mentioned above, neither House had the right to vote resolutions on the results of such reports in order to influence government's strategy in negotiations at Community level. Consequently, the work of the EC-Delegations remained known to "insiders" only and parliamentary participation in Community affairs continued to be a thankless "hobby" for a handful of experts.

On the occasion of the ratification of the Maastricht Treaty, which in France required a change of the constitution, the parliament succeeded in pushing through a new provision, article 88-4 Cf., by which government, for the first time, became constitutionally obliged to provide parliament with all proposals for Community acts which, if they were adopted at national level, would be subject to a law. More importantly, both Houses of Parliament were explicitly

²⁵⁰ Loi n° 79-564 du 6 juillet 1979 modifiant l'ordonnance n° 58-1100 du 17 novembre 1958 relative au fonctionnement des Assemblées parlementaires en vue de la création de délégations parlementaires pour les Communautés européennes, JO, *Lois et Décrets*, 7 juillet 1979, 1643f., rect. JO, 18 juillet 1979, 1867, hereafter: Ordonnance 58-1100.

I should add that according to article 43(2) Cf., neither House may establish more than six (permanent) parliamentary committees. This provision, which fits well with the concept of the "parlementarisme rationalisé", was introduced in 1958 in order to hinder the previously deplored "government of committees". In 1979, both Houses already had six committees. The establishment of (permanent) *EC Committees* was therefore impossible. The French Constitution does not provide for "parliamentary delegations"; consequently, only limited powers could be entrusted to the EC-Delegations of the Senat and the National Assembly. However, today the EC-Delegations have achieved a position which, both legally and practically, is almost equal to that of parliamentary committees. On the legal issues regarding parliamentary delegations see *Pierre Avril/Jean Gicquel, Droit Parlementaire*, Montchrestien, Paris 1988, pp.85-87, and *Jacques Desandre, Les délégations parlementaires, bilan et questions, Revue du droit public et de la science politique en France et à l'étranger* 1984, pp. 77-103, esp. 94-103.

²⁵¹ Loi n° 90-385 du 10 mai 1990 modifiant l'article 6 bis de l'ordonnance n° 58-1100 du 17 novembre 1958 relative au fonctionnement des assemblées parlementaires, JO 1990, *Lois et Décrets*, 11 mai 1990, 5619.

²⁵² See article 6bis (IV) Ordonnance 58-1100.

empowered to vote resolutions on such proposals²⁵³.

Especially in the National Assembly, the EC-Delegation immediately took the lead, and established a scrutiny procedure which has become very similar to that of the EC Select Committee in the House of Commons²⁵⁴. The delegation has begun to systematically sift all incoming EC-proposals, to produce regular reports and to make proposals for resolutions²⁵⁵. These proposals are first deliberated in a parliamentary committee and then debated on the Floor²⁵⁶. Resolutions adopted by either House do not legally bind the government²⁵⁷.

Two remarks should be added to this. Firstly, as noted above, article 88-4 Cf. only applies to Community proposals which, if they were adopted at national level, would be subject to a parliamentary law. The possible scope of article 88-4 Cf. is thus significantly narrowed, for under article 34 Cf., in conjunction with article 37 Cf., parliament's legislative powers are fairly restricted²⁵⁸. Secondly, article 88-4 Cf. contains no clause, which, as in the case of the United Kingdom, would oblige government to give its consent in the Council only after parliament has had the possibility to complete the scrutiny. As a result of this, in the two years following the introduction of article 88-4 Cf. parliament was frequently

²⁵³ Article 88-4 Cf.: "Le Gouvernement soumet à l'Assemblée nationale et au Sénat, dès leur transmission au conseil des Communautés, les propositions d'actes communautaires comportant des dispositions de nature législative.

Pendant les sessions ou en dehors d'elles, des résolutions peuvent être votées dans le cadre du présent article, selon les modalités déterminées par le règlement de chaque assemblée."

²⁵⁴ It should be added that the previous article 6bis Ordonnance 58-1100, which constitutes the legal base for the operation of the EC-Delegations remained untouched by article 88-4 Cf. This is important, because this provision obliges the government to far more extensive information than article 88-4 Cf. The situation may therefore, in short be described, as follows: the EC-Delegations continue their work under article 6bis Ordonnance 58-1100. In addition, parliament has established special information, debating and voting procedures for EC-proposals that fall within the scope of article 88-4 Cf.

²⁵⁵ The EC Delegation of the National Assembly is now assisted by a staff of some 15 persons. Ten of them are academics. From April 1993 to June 1994 the Delegation produced 48 reports. A report on the GATT comprised some 450 pages; another regarding the role of French parliament in the EU 400 pages. See *Pandraud (1994)*, 403ff.

²⁵⁶ On the work of the EC-Delegation and the scrutiny procedures in the National Assembly see *Pandraud (1994a)*, and articles 151-1 to 151-4 RAN. In the Sénat, the EC Delegation plays a less important role and initiatives do more often stem from one of the six permanent parliamentary committees. See article 73bis RS, and *Jacques Genton: Le Sénat face à la législation communautaire, Rapport d'information fait au nom de la délégation du Sénat pour les Communautés européennes, Sénat, N° 338 du 13 avril 1994*, in: "Les rapports du Sénat", N° 338 (1993-1994).

²⁵⁷ See *Conseil Constitutionnel*, DC n° 92-314 du 17 décembre 1992, printed in: *Luchaire*, 321 (consideration n° 7).

²⁵⁸ See above footnote 244.

informed by the government too late²⁵⁹. At best, early and complete information took place if the government sought parliamentary backing for negotiations at Community level. This situation has, however, now started to change, since on 19 July 1994 French Prime Minister, *Edouard Balladur*, undertook to respect, within the scope of article 88-4 Cf., a "*réserve d'examen parlementaire*", which, on paper, looks quite similar to the *scrutiny reserve* in the United Kingdom²⁶⁰.

To sum up, during the last two years, the French system of EC-scrutiny has undergone an astounding evolution. After almost forty years of lethargy, the parliament has, in a short time, succeeded in establishing a scrutiny procedure which has become very similar to that which is successfully applied in the United Kingdom. Thus, in France, *Community affairs* are no longer treated as *foreign affairs*. It should be added that the recent upsurge of the conservative and nationalist parties in France has undoubtedly furthered this process.

2. Parliament and CJHA

Up to now, however, the government has taken a more cautious approach with regard to parliamentary participation on CJHA. Like the United Kingdom it has not accepted complete analogy to Community affairs. Supported by an advisory opinion of the French *Conseil d'Etat*, the government has decided to apply the new article 88-4 Cf. neither to the Second Pillar (CFSP) nor to the Third Pillar. The government argues that these European Union policies were not within the scope of article 88-4 Cf. which only mentions "*proposals for Community acts*" ("*propositions d'actes communautaire*"). No doubt, from a legal point of view this grammatical interpretation of article 88-4 Cf. is correct²⁶¹. As a result, Parliament may not vote resolutions on proposals under Title VI TEU and the government is not bound to respect the "*réserve d'examen parlementaire*".

However, in June 1994 Parliament pushed through a revision of article 6bis Ordonnance 58-1100, which, as explained above²⁶², continues to form the

²⁵⁹ In fact, proposals for Community acts often arrived at the parliament *after* they had been adopted by the Council.

²⁶⁰ See *Premier ministre*, Circulaire du 19 juillet 1994 relative à la prise en compte de la position du Parlement français dans l'élaboration des actes communautaires, JO, Lois et Décrets, 21 juillet 1994, 10510.

²⁶¹ See *Weber-Panariello*, § 11.11.B.b.

²⁶² See above footnote 254.

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legal basis for the operation of the EC-Delegations in both Houses of Parliament²⁶³. The delegations were renamed *EU-Delegations* ("*délégations parlementaires pour l'Union européenne*"), and their competence to obtain information from the Government (and others) was explicitly extended to all matters regarding the *European Union*²⁶⁴. Accordingly, article 6bis (IV)(1) to (3) Ordonnance 58-1100 now provides:

"Les délégations parlementaires pour l'Union européenne ont pour mission de suivre les travaux conduits par les institutions de l'Union européenne en application des traités du 18 avril 1951 et du 25 mars 1957, de l'Acte unique européen des 17 et 28 février 1986, du traité sur l'Union européenne signé le 7 février 1992 et des textes subséquents afin d'assurer l'information de leur assemblée respective.

A cet effet, le Gouvernement leur communique, dès leur transmission au Conseil de l'Union européenne, les projets de directives et de règlements et autres actes de l'Union, à l'exception des projets d'actes à caractère nominatif établis sur le fondement du titre VI du traité sur l'Union européenne, ainsi que tout document nécessaire établi par les différentes institutions de l'Union européenne. Le Gouvernement les tient en outre informées des négociations en cours.

Les délégations peuvent demander à entendre les ministres ainsi que des représentants des institutions de l'Union."

The government is thus supposed to provide both delegations with proposals going to the Council of Interior and Justice ministers and with other documents established by the institutions of the European Union under the Third Pillar. Furthermore, article 6bis (IV)(2) Ordonnance 58-1100 obliges the government to keep the EC Delegations informed of ongoing negotiations regarding CJHA²⁶⁵. Parliamentary access to documents and to the decision-making procedures in the areas of Title VI TEU has thus become easier.

On the whole, like in the United Kingdom, the French parliament finds itself in an ambiguous situation. Thanks to the inclusion of CJHA into the framework of the TEU, it is now provided with information at an earlier stage and more systematically than under previous arrangements. Importantly, these policies will now be scrutinized by parliamentary bodies, the EU Delegations,

²⁶³ Loi n° 94-476 du 10 juin 1994, in: JO, Lois et Décrets, 11 juin 1994, 8449.

²⁶⁴ See also Lucien Lanier (*Rapporteur*), Rapport fait au nom de la commission des Lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale sur: 1° la proposition de loi de M. Jacques Genton tendant à modifier l'article 6 bis de l'ordonnance n° 58-1100 du 17 novembre, ... , Sénat, N° 415 (Second S.O. 1993-1994); and Pierre Mazeaud (*Rapporteur*) Rapport fait au nom de la commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur la proposition de loi (n° 1055) de M. Robert Pandraud et plusieurs de ses collègues, tendant à modifier l'article 6 bis de l'ordonnance n° 58-1100 du 17 novembre 1958, Assemblée nationale, N° 1140 du 20 avril 1994.

²⁶⁵ However, excluded are pursuant to article 6bis (IV)(2) Ordonnance 58-1100 "des projets d'actes à caractère nominatif établis sur le fondement du titre VI du traité sur l'Union européenne". Acts and information regarding appointments, which in particular for safety reasons may require strict confidentiality (e.g. combating terrorism) will thus not be transmitted to parliament.

which in the last years have built up a considerable expertise and started to conduct a substantive dialogue with the government on Community affairs. Apart from that, however, matters of Title VI TEU are still dealt with much like foreign affairs: there is no "réserve d'examen parlementaire" and parliament may still not vote any resolution on matters of justice and home affairs²⁶⁶.

C. Germany²⁶⁷

1. The role of Parliament in foreign affairs and in Community affairs

From a legal point of view, the German *Bundestag's* position in foreign policy does not look much different from that of the two parliaments described above. Foreign policy under the German constitution is within the prerogative of the government, and ministers' actions may be examined or criticised through oral or written questions or by debate²⁶⁸. Like the British parliament, the *Bundestag* may vote (legally non-binding) resolutions on matters of foreign policy. However, the *Bundestag* does not need to be formally consulted by the government before or during negotiations on a treaty or before a text is signed. After signature, pursuant to article 59(2) GG, the assent or the participation of the legislative bodies to be given in statutory form "is required with respect to treaties which regulate the political relations of the Federal Republic or which relate to subjects of federal legislation". The first group of treaties concerned are "political" treaties²⁶⁹. The second and more important group of treaties includes those for

²⁶⁶ Interestingly, in practice, parliament has found a way to evade the restrictions of article 88-4 Cf. and to vote resolutions on matters of Title V and VI TEU. The EC Delegation of the National Assembly produced a report on CFSP. The findings of this report were subsequently inserted into a draft resolution on the draft Community budget for 1995, which had been transmitted to parliament pursuant to article 88-4 Cf., and which included expenditures on CFSP (and CJHA). On 14 July 1994, the draft resolution was debated in the National Assembly and finally adopted in a modified version. See *Pierre Lellouche (Rapporteur), Rapport d'information déposé par la Délégation de l'Assemblée nationale pour les Communautés européennes sur l'Europe et sa sécurité: bilan et avenir de la politique étrangère et de sécurité commune (PESC) de l'Union européenne, Assemblée nationale, N° 1294 du 31 mars 1994, and JO, Assemblée nationale, Débats, 14 juillet 1994, 4852-4865.*

²⁶⁷ This section will only deal with the directly elected *Bundestag*, which is the primary parliamentary body in Germany and to which alone the federal government is accountable. For a detailed and up-to-date description of the role of the *Bundesrat* in matters of the European Union see *Rudolf Morawitz/Wilhelm Kaiser, Die Zusammenarbeit von Bund und Ländern bei Vorhaben der Europäischen Union, Bonn 1994.*

²⁶⁸ See *Tomuschat (1980)*, p. 26-40.

²⁶⁹ These have been defined by the German *Bundesverfassungsgericht* as agreements which affect "the existence of the state, its territorial integrity, its independence, its position or its relevant weight in the international community". BVerfGE 1, 380.

the implementation of which federal legislation has to be enacted²⁷⁰. As in France (and in the United Kingdom) the *Bundestag's* right of formal approval depends upon the legal force of the act in question. Therefore, "soft law" (and other legally non-binding acts) is not susceptible to being brought before parliament for formal authorization.

Notwithstanding the described similarities, in practice, parliamentary participation in foreign affairs in Germany differs rather significantly from that in the United Kingdom and in France. Notably, much more importance is given to the work of (departmentally-related) specialist committees²⁷¹. International treaties for which parliamentary approval is required under article 59(2) GG are referred to the competent committee(s) which proceed(s) to a rather detailed assessment. Only questions of principle are raised in public debate on the Floor. Furthermore, the government normally furnishes regular information to the Foreign Affairs Committee on any important negotiating process which it has started or is about to initiate²⁷². According to Schweitzer, however, deliberations in this committee often remain rather superficial and the information furnished to it by the government is not always complete²⁷³. More detailed or confidential information may be given in meetings of the head representatives of each parliamentary group in the Foreign Affairs Committee²⁷⁴. Probably the most substantial dialogue between the government and its majority is conducted in the so-called "*working parties*" of the parliamentary groups²⁷⁵. *Working parties* meet before every session of their corresponding specialist committee in order to discuss matters on the committee's agenda. On government side, ministers and officials regularly attend such meetings, thereby granting earlier information and opportunities to participate for the parliamentary majority. It should be added, however, that this dialogue between the government and its majority is conducted far more intensively on national policies than on foreign policy.

²⁷⁰ BVerfGE 1, 388. Thereby included are all treaties which directly affect the citizen, as in particular legal duties of the citizen can be created only by an act of parliament, the executive - in contrast to France - lacking any autonomous powers of passing regulations or other acts of delegated legislation. See Tomuschat (1980), p. 27.

²⁷¹ Even though the *Foreign Affairs Committee* is entrusted with the great bulk of activities concerning foreign policies, it does not have exclusive jurisdiction.

²⁷² See Tomuschat (1980), pp. 35-37.

²⁷³ See Schweitzer (1980), pp. 12-13.

²⁷⁴ See above, footnote 96.

²⁷⁵ The "*working parties*" comprise all members of a parliamentary group sitting on a specific committee.

In the past the German *Bundestag* has shown little interest in scrutinizing *Community affairs*²⁷⁶. This may, firstly, be explained by the pro-European consensus among all the major parties. Secondly, the *Bundestag* has always supported the EP's claims for more powers. Accordingly, it has considered itself more as a "temporary substitute" for the EP; that is, it would scrutinize such issues only until the EP was a parliament "in the full sense of the word". Thirdly, the work of the *Bundestag* rests heavily on a sophisticated groundwork of specialist committees. In these committees, and in the *working parties*, national policies are discussed among parliamentary experts and government representatives at length and in great detail. Thereby, parliament tries to make a substantial contribution and to add more expertise to the final outcome of such policies. For obvious reasons (e.g. less time, more actors, limited information etc.), the application of such procedures to *Community affairs* is far more difficult and may easily cause great frustration among MPs. Therefore even though, in 1957, government undertook to provide regular information to the *Bundestag* on developments within the Council²⁷⁷, *Community affairs* were rarely discussed in detail in committees or *working parties* or debated on the Floor. Several attempts to establish powerful EC-Committees have also failed²⁷⁸.

However, the situation changed after the signing of the Maastricht Treaty. As in France, the ratification of the TEU in Germany required a change of the constitution. To this end, a new article 23 GG was adopted by the *Bundestag* and the *Bundesrat* in December 1992. Article 23 GG not only authorises German membership in the European Union²⁷⁹, it also introduces special rules regarding parliamentary participation in European Union affairs. Article 23(2) and (3) GG, in particular, stipulates:

"In Angelegenheiten der Europäischen Union wirken der Bundestag und durch den Bundesrat die Länder mit. Die Bundesregierung hat den Bundestag und den Bundesrat umfassend und zum frühestmöglichen Zeitpunkt zu unterrichten.

Die Bundesregierung gibt dem Bundestag Gelegenheit zur Stellungnahme vor ihrer Mitwirkung an Rechtssetzungsakten der Europäischen Union. Die Bundesregierung berücksichtigt

²⁷⁶ See Weber-Panariello, § 16.1.

²⁷⁷ See article 2 of the act confirming the EEC and EAEC treaties, BGBl. II, 753.

²⁷⁸ See Weber-Panariello, § 16.11.

²⁷⁹ See article 23(1) GG, and Ulrich Everling, Überlegungen zur Struktur der Europäischen Union und zum neuen Europa-Artikel im Grundgesetz, in: Deutsches Verwaltungsblatt 1993, pp. 936-940.

die Stellungnahmen des Bundestages bei den Verhandlungen. Das nähere regelt ein Gesetz.²⁸⁰

The government is thus obliged to inform the *Bundestag* comprehensively and early with regard to European Union affairs²⁸¹. Furthermore, before giving its consent to a legislative proposal in the EU Council, the government must provide the *Bundestag* with the opportunity to give an opinion on such a proposal ("parliamentary reserve")²⁸². Opinions given by the *Bundestag* shall be taken into account by the government in negotiations at the level of the European Union²⁸³.

In addition to article 23 GG, a new article 45 GG was adopted which stipulated the establishment of a parliamentary *Committee for European Union Affairs*. This Committee may, by delegation, exercise the *Bundestag's* powers under article 23 GG²⁸⁴.

On the whole, parliamentary participation in European Union affairs has thus become significantly more formalised. Basic principles are now explicitly laid down in the constitution; detailed rules are set up in the EUZBTG. The establishing of a special committee widens the chances of a more systematic and coordinated parliamentary participation than under the previous arrangements²⁸⁵. Interestingly, the German EC scrutiny system, like the French system, seems to be moving towards the British model, which, as shown above, rests

²⁸⁰ Article 23(4-6) GG contains detailed provisions regarding the participation of the *Bundesrat* in matters of the European Union.

²⁸¹ In order to bring into effect article 23(2) and (3) GG parliament adopted a special law - the EUZBTG (see List of Abbreviations). With regard to the information of the *Bundestag*, this law, *inter alia*, provides in § 4: "Die Bundesregierung übersendet dem Bundestag insbesondere die Entwürfe von Richtlinien und Verordnungen der Europäischen Union und unterrichtet den Bundestag zugleich über den wesentlichen Inhalt und die Zielsetzung, über das beim Erlass des geplanten Rechtssetzungsakts innerhalb der Europäischen Union anzuwendende Verfahren und den voraussichtlichen Zeitpunkt der Befassung des Rates, insbesondere den voraussichtlichen Zeitpunkt der Beschlussfassung im Rat. Sie unterrichtet den Bundestag unverzüglich über ihre Willensbildung, über den Verlauf der Beratungen, über die Stellungnahme des Europäischen Parlaments und der Europäischen Kommission, über die Stellungnahmen der anderen Mitgliedstaaten sowie über die getroffenen Entscheidungen."

²⁸² § 5 EUZBTG provides: "Die Bundesregierung gibt vor ihrer Zustimmung zu Rechtssetzungsakten der Europäischen Union dem Bundestag Gelegenheit zur Stellungnahme. Die Frist zur Stellungnahme muss so bemessen sein, dass der Bundestag ausreichend Gelegenheit hat, sich mit der Vorlage zu befassen. Die Bundesregierung legt die Stellungnahme ihren Verhandlungen zugrunde."

²⁸³ Such opinions, however, do not legally bind the government. See Moller/Lampert, pp. 27-28.

²⁸⁴ Article 45 GG provides: "Der Bundestag bestellt einen Ausschuss für die Angelegenheiten der Europäischen Union. Er kann ihn ermächtigen, die Rechte des Bundestages gemäss Artikel 23 gegenüber der Bundesregierung wahrzunehmen."

²⁸⁵ See Weber-Panariello, § 16.VI [Funktion und Kompetenzen des zukünftigen Europausschusses].

mainly upon the three pillars: early and extensive information based on a formalised procedure, systematic examination of proposals by special EC-Committees, and "parliamentary reserve".

2. Parliament and CJHA

In contrast to the United Kingdom and France, however, in Germany legally no distinction is made between *European Community Affairs* and *European Union Affairs*. The special procedures established under the new article 23 (2) and (3) GG apply fully to the Third Pillar. As in the parliaments described above, these arrangements do not displace the *Bundestag's* "traditional" powers concerning the ratification of international treaties under article 59 GG.

With regard to the special procedures for European Union Affairs, it is of interest to note, however, that the principle of "parliamentary reserve" as laid down in article 23(3) GG and § 5 EUZBTG only applies to proposals for *legislative acts* ("Rechtsetzungsakte") at the Union level. A similar qualification was made with regard to the government's obligations to inform the *Bundestag*. The above quoted § 4 EUZBTG²⁸⁶, which specifies government's respective obligations, is aimed at *EU-legislative proposals*. Documents which do not concern such proposals will, pursuant to § 3 EUZBTG, only be submitted to the *Bundestag* if they are "of interest to Germany"²⁸⁷. As acts adopted under Title VI TEU will in many cases not be clearly legally binding, the German government is left with great discretion when applying article 23 GG and the EUZBTG to CJHA.

These reservations notwithstanding, the *Bundestag's* rights with regard to information and participation in CJHA have been strengthened by article 23 GG. Firstly, the new arrangements will lead to a more comprehensive and systematic informing of the *Bundestag* on matters of Title VI TEU. Presumably, information will no longer be reserved for a handful of highly select MPs within the parliamentary group on the side of government or within a specialist committee²⁸⁸. Secondly, according to article 23(3) GG and § 5 EUZBTG, the *Bundestag* now has the explicit right to be formally consulted *before* the government gives its consent to a legislative act in the Council of Interior and Justice Ministers.

²⁸⁶ See above footnote 281.

²⁸⁷ See *Weber-Panariello*, § 16.V.B.

²⁸⁸ See above footnote 96.

Conclusions

The establishment of the Third Pillar has not, as such, changed the intergovernmental character of CJHA. It has, however, changed the *model* of intergovernmental cooperation in these fields significantly.

As argued in Chapter 2, cooperation under the new legal and institutional framework of Title VI TEU has become more structured and formalized than under previous arrangements as described in Chapter 1. Even though numerous deficiencies remain²⁸⁸, it may therefore be suggested that this new framework will lead to more "legislative" procedures - in contrast to "diplomatic procedures" - and openness in CJHA at the level of the European Union.

In addition, the conclusion of the TEU has, at *national* level, stimulated debates on the role of national parliaments not only in *Community affairs* but in all *European Union affairs*. Importantly, due to the introduction of CJHA into the framework of the TEU, national parliaments have become more aware of the cooperation among the Twelve in these fields which, as shown above, had started a long time before 1993.

Consequently, during the ratification of the TEU, national parliaments have pushed their governments to commit themselves to more openness and deeper parliamentary involvement. Before the establishment of the Third Pillar, intergovernmental cooperation in the fields of justice and home affairs was generally assessed as *foreign policy*. Traditionally, the conduct of foreign policy comes within the prerogative of the executive and the rights of parliaments to participate are fairly limited²⁸⁹. However, Maastricht has made it clear that because of the close links between the First Pillar and the Third Pillar, the proper analogy should be with the scrutiny of *Community affairs*, for which all Member States' parliaments have established special scrutiny procedures granting them more extensive information and earlier participation.

In the Member States described here as well as in other EU Member States²⁹⁰, these special arrangements now also apply to the Third Pillar. However, not in all Member States have governments agreed to full analogy.

²⁸⁸ See Chapter 2.A, pp. 37-42, and the summary of Chapter 2, pp. 54-56.

²⁸⁹ See above pp. 57-58, 65-66 and 71-72.

²⁹⁰ For recent descriptions of the Danish example see *Ameline (1994b); Parlement Européen - Direction générale des études, Danemark - Folketing: Procédures gouvernementales d'information du parlement sur les question européennes, Note d'information N° 48/94 (PE 183.044)*. With regard to the other Member States, The Netherlands in particular, see *Pandraud (1994)*, pp. 269-320.

Also, the application of the EC scrutiny procedures to CJHA is rendered difficult by various facts. Notably, in contrast to Community legislation, not all measures will begin with a *formal proposal* from the Commission which is in the public domain. Similarly, not all changed proposals and final texts will automatically be published²⁹¹. Also, parliaments' rights of access to information and to participate in EU decision-making, in many Member States, depend upon the legal effect which such acts will supposedly have. However, in Chapter 2 it was suggested that the legal nature of acts negotiated under the Third Pillar will often remain unclear²⁹².

The EP has repeatedly expressed the view that the best way of strengthening the democratic legitimacy of CJHA would be to give more power to the EP²⁹³. This leaves national governments with the dilemma either to accept the EP's claims or to prove that the democratic legitimacy of CJHA can be strengthened by "improved" procedures at national level. The British and French parliament, in particular, used this argument in order to strengthen their own position when they ratified the Maastricht Treaty²⁹⁴. However, to play national parliaments and the EP off against one another may well be the wrong strategy. Instead, the role of these bodies is *complementary* and should be assessed as such. Also, it should be noticed that since the entry into force of the TEU rather little progress has been achieved in the fields of justice and home affairs. The ability of national parliaments to control their governments in CJHA has thus not been fully tested yet. A stronger involvement of the EP will, in my view however, become inevitable, if Member States eventually agree to hold majority votes under Title VI TEU in order to accelerate decision-making and to (finally) achieve more substantial results in CJHA.

It can thus be concluded that Title VI TEU may lead to greater openness of CHJA, more parliamentary accountability of the executive, and increased possibilities of parliamentary (and public) participation in the fields of justice and home affairs. The Maastricht Treaty therefore constitutes a step towards more democracy. However, it remains to be seen whether national authorities will cooperate on an equal partner basis with parliaments at national level and

²⁹¹ See above p. 56.

²⁹² See above pp. 41-42.

²⁹³ See e.g., the Resolution of 15 July 1993, OJ No. C 255 of 20.09.1993, p. 168, and above pp. 49-54.

²⁹⁴ In contrast, as shown above, the German Bundestag has always supported the EP's claims for more powers. See above p. 73.

at European level. In any event, the structure still retains plenty of opportunities for executive authorities to remove themselves from an open review of their work.

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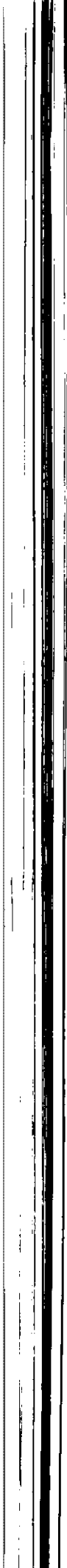
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LIST OF ABBREVIATIONS

BVerfGE	Entscheidungen des Deutschen Bundesverfassungsgerichts
Cf.	Constitution française du 4 octobre 1958
CFSP	Common Foreign and Security Policy (Title V TEU)
CJHA	Cooperation in the Fields of Justice and Home Affairs (Title VI TEU)
COREPER	Comité des Représentants Permanents des Etats Membres
ECJ	European Court of Justice
EC	Treaty on European Community (Title II TEU)
EEC	Treaty on European Economic Community
EP	European Parliament
EUZBTG	Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union vom 12. März 1993
GG	Grundgesetz (Basic Law) der Bundesrepublik Deutschland vom 23. Mai 1949
GOBT	Geschäftsordnung des Deutschen Bundestages
HC/HL Deb	Parliamentary Debates (Hansard) House of Commons/House of Lords; hereafter: HC/HL Deb, Date, Col
JO	<i>Journal Officiel</i> de la République française
MEP	Member of the European Parliament
MP	Member of Parliament
OJ	<i>Official Journal</i> (EC)
RAN	Règlement de l'Assemblée nationale française
RS	Règlement du Sénat français
TEU	Treaty on European Union

